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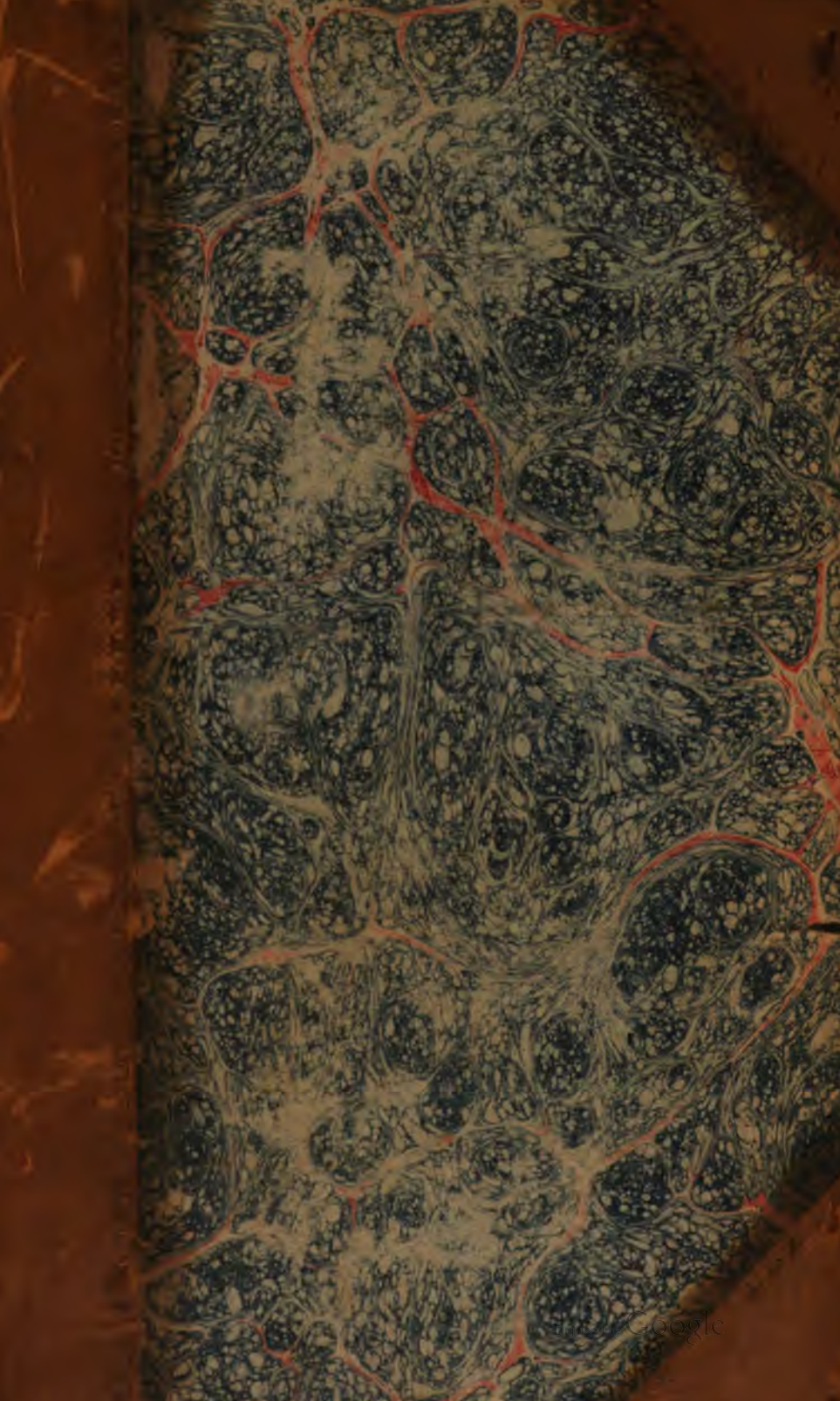
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S. H. 1825

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GIFFORD'S
ENGLISH LAWYER;
OR,
Every Man his own Lawyer:

CONTAINING
A SUMMARY OF THE CONSTITUTION
OF
ENGLAND;
ITS
Laws and Statutes,

Particularly those relative to

ARRESTS,
BANKRUPTCY,
BENEFIT SOCIETIES,
BILLS OF EXCHANGE,
THE CLERGY,
DISTRESSES,
THE GAME LAWS,

EXECUTORS AND ADMIN-
ISTRATORS,
GUARDIAN AND WARD,
HUSBAND AND WIFE,
INSOLVENT DEBTORS,
LANDLORD AND TENANT,
LIBEL,

MASTERS AND WORKMEN,
MASTER AND SERVANT,
NUISANCES,
PARENT AND CHILD,
PARISH OFFICERS,
TITHES,
WILLS, &c. &c. &c.

ALSO,

The Criminal Law of England,

COMPRISING EVERY SPECIES OF PUBLIC OFFENCES WITH THEIR PUNISHMENTS.

TO WHICH IS ADDED AN APPENDIX,

Containing the most approved Forms of Agreements, Leases, Wills and Testaments, Notices
between Landlord and Tenant, Contracts, Articles of Copartnership, &c. &c.

ALSO,

A SUPPLEMENT,

CONTAINING

THE INSURANCE LAWS,

THE EXCISE LAWS,
THE CUSTOMS' LAWS,

THE ASSESSED TAXES,
THE STAMP DUTIES, &c.

*The whole carefully digested, and the Statutes and Term Reports brought down to
the 6th Geo. IV.*

By **JOHN GIFFORD, Esq.**

The Eleventh Edition.

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1825.

501.

us, that to know what the laws of our country have forbidden, and the deplorable consequences to which a wilful disobedience may expose us, is matter of universal concern." The observations here quoted, of this learned Commentator, apply with equal force to our civil rights, the preservation of which greatly depends upon a due and competent knowledge of the laws.

Having thus briefly endeavoured to shew how necessary to our safety, as well as important to our interests it is, that we should obtain a knowledge of the laws of our country, we shall proceed to state the plan of this Work. We have to observe, that its object is not, neither does it pretend, to make us complete masters of the science of the law, for that would be utterly impossible in a work of this compass: but its principal aim is, to furnish the reader, in a concise form, and in a familiar style, with a knowledge of those laws and statutes which more particularly concern him in his ordinary affairs. It has attempted to sketch an outline of the constitution, and has endeavoured to shew the supremacy of the law, its functions, and the form and practice of the courts established for its administration. In the arrangement and distribution of materials for the Work, the principal object has been to collect and compress under each subject, all the laws and statutes relative to it: by which means the scattered information, which is only to be found by constant reference to books, and at a great expence in their purchase, is exhibited under one view, and under its proper head and title; and, in order to render the Work still more useful, the laws which concern some of the principal branches of trade, manufactures, and commerce, which may not be found embodied in it, are given under distinct heads. By this means we have endeavoured to comprise within its pages all the legal information which its varied and multifarious contents would seem to require.

To this Edition is now added a SUPPLEMENT, containing the Insurance Laws, the Laws of Excise and Customs, the Assessed Taxes, and the Stamp Duties; besides such acts of parliament as have passed since the first appearance of the Work, and which cannot well be incorporated in it. This addition to its contents, we hope, will render the Work still more acceptable to the reader.

1825.

THE COMPLETE

ENGLISH LAWYER;

OR,

EVERY MAN HIS OWN LAWYER.

INTRODUCTION.

Of the Laws of England.

BEFORE we enter upon the subject of the following Work, it may be necessary to take a short and concise view of the LAW OF ENGLAND, in which we shall endeavour, from the learned Commentaries of Blackstone, to shew the principles out of which it has sprung. This information will, we trust, clear up the obscurity in which many of our laws and early customs are involved, and will better enable the reader to understand the reason upon which they are founded, and without which information the subject would appear dark and obscure to him.

The law of England is, according to Blackstone, divided into two kinds: the *lex non scripta*, the unwritten, or *common law*; and the *lex scripta*, the written, or *statute law*.

When we speak of the *leges non scriptæ*, or unwritten laws, says this learned author, we would not be understood as if all those laws were at present merely oral, or communicated from former ages to the present solely by word of mouth. But they are so styled, because their original institution and authority are not set down in writing, as acts of parliament are, but they receive their binding power, and the force of laws, by long and immemorial usage, and by their universal reception throughout the kingdom.

The *lex non scripta*, or COMMON LAW, is properly distinguishable into three kinds: 1. *General customs*, which are the universal rule of the whole kingdom, and form the common law in its stricter and more usual signification. 2. *Particular customs*, which for the most part affect only the inhabitants of particular districts. 3. *Certain particular customs*, which by custom are adopted and used by particular courts.

1. As to *general customs*, or the common law properly so called; this is that law, by which proceedings and determinations in the courts of justice are guided. By it also is settled the course in which lands descend by inheritance; the manner and

form of acquiring and transferring property; the solemnities and obligation of contracts; the rules of expounding wills, deeds, and acts of parliament; and an infinite number of minute particulars, which diffuse themselves as extensively as the ordinary distribution of common justice requires. Thus, for example, by the common law, the eldest son alone is heir to his ancestor; property is acquired and transferred by writing; a deed is of no validity, unless sealed and delivered; wills are construed more favourably, and deeds more strictly; money lent upon bond is recoverable by action of debt; the breaking the public peace is an offence, and punishable by fine and imprisonment: all these are doctrines that are not set down in any written statute or ordinance, but depend merely upon immemorial usage, or upon the common law, for their support.

But here a question arises, How are these customs to be known? and by whom is their validity to be determined? The answer is, By the judges in the several courts of law. They are to decide in all cases of doubt, and are bound by an oath to decide according to the law of the land. And these judicial decisions are the principal and most authoritative evidence that can be given of the existence of such a custom as shall form a part of the common law.

II. The second branch of the unwritten, or common law of England, are *particular customs*, or laws which affect the inhabitants of particular districts. Such is the custom of *gavelkind* in Kent and some other parts of the kingdom, which ordains, among other things, that not the eldest son only of the father shall succeed to his inheritance, but all the sons alike; and that, though the ancestor be attainted and hanged, yet the heir shall succeed to his estate, without any escheat to the lord. Such is the custom that prevails in divers ancient boroughs, and therefore called *borough english*, that the youngest son shall inherit the estate in preference to all his elder brothers.* Such is the custom in other boroughs, that a widow shall be entitled, for her dower, to all her husband's lands; whereas at the common law, she shall be endowed of one third part only. Such also are the special and particular customs of manors, of which every one has more or less, and which bind all the copyhold and customary tenants that hold of the said manors. Such likewise is the custom of holding divers inferior courts, with power of trying causes, in cities and trading towns; the right of holding which, when no royal grant can be shewn, depends entirely upon immemorial and established usage. Such, lastly, are many particular customs within the city of London, with regard to trade, apprentices, widows, orphans, and a variety of other matters. All these are contrary to the general law of the land, and are good only by special usage. To this head may be referred the custom of mer-

* The reason of this is said to be, that, during the fœdal times, the lord claimed the privilege of sleeping the first night with his vassal's bride; so that the lands descended to the youngest, from the supposed illegitimacy of the eldest.

chants, or *lex mercatoria*; which, however different from the general rules of the common law, is yet ingrafted into it, and made a part of it.

With regard to the establishment of customs; before a custom can be pleaded in court, it must be proved; we will therefore consider the rules of proof.

As to *gavelkind* and *borough english*, the law takes particular notice of them; and there is no occasion to prove that such customs actually exist, but only that the lands in question are subject thereto. All other private customs must be particularly pleaded; and as well the existence of such customs must be shewn, as that the thing in dispute is within the custom alleged.

The *customs of London* differ from all others in point of trial; for if the existence of the custom be brought in question, it shall not be tried by a jury, but by certificate from the lord mayor and aldermen, by the mouth of the recorder; unless it be such a custom as the corporation is itself interested in, as a right of taking toll, &c. for then the law permits them not to certify on their own behalf.

When a custom is actually proved to exist, the next inquiry is into the *legality* of it; for if it is not a good custom, it ought to be no longer used: *Malus usus abolendus est*, is an established maxim of the law. To make a particular custom good, the following are necessary requisites:—

1. That it hath been *used so long*, that the memory of man runneth not to the contrary. So that if any one can shew the beginning of it within legal memory, that is, within any time since the first year of the reign of Richard I. it is not a good custom.

2. It must have been *continued*. Any interruption would cause a temporary ceasing: the revival gives it a new beginning, which will be within time of memory, and thereupon the custom will be void. But this must be understood with regard to an interruption of the *right*; for an interruption of the *possession* only, for ten or twenty years, will not destroy the custom. As if the inhabitants of a parish have a customary right of watering their cattle at a certain pool, the custom is not destroyed, though they do not use it for ten years; it only becomes more difficult to prove: but if the *right* be any how discontinued for a day, the custom is quite at an end.

3. It must have been *peaceable*, and acquiesced in; not subject to contention and dispute. For as customs owe their original to common consent, their being immemorially disputed, either at law or otherwise, is a proof that such consent was wanting.

4. Customs must be *reasonable*; or rather, taken negatively, they must not be unreasonable. Upon which account a custom may be good, though the particular reason of it cannot be assigned. Thus, a custom in a parish, that no man shall put his beasts into the common till the 3d of October, would be good; and yet it would be hard to shew the reason why that day in particular is fixed upon, rather than the day before or after. But a

custom, that no cattle shall be put in till the lord of the manor has first put in his, is unreasonable, and therefore bad; for peradventure the lord will never put in his, and then the tenants will lose all their profits.

5. Customs ought to be *certain*: A custom, that lands shall descend to the most worthy of the owner's blood, is void; for how shall this worth be determined? But a custom to descend to the next male of the blood, exclusive of females, is certain, and therefore good. A custom to pay two-pence an acre in lieu of tithes is good: but to pay sometimes two-pence and sometimes three-pence, as the occupier of the land pleases, is bad, for its uncertainty. Yet a custom to pay a year's improved value for a fine on a copyhold estate is good, though the value is a thing uncertain; for the value may at any time be ascertained; and the maxim of the law is, *Id certum est, quod certum reddi potest*.

6. Customs, though established by consent, must be (when established) *compulsory*; and not left to the option of every man, whether he will use them or no. Therefore a custom, that all the inhabitants shall be rated toward the maintenance of a bridge, will be good: but a custom, that every man is to contribute thereto at his own pleasure, is idle and absurd, and indeed no custom at all.

7. Lastly, customs must be *consistent* with each other; one custom cannot be set up in opposition to another. For if both are really customs, then both are of equal antiquity, and both established by mutual consent; which to say of contradictory customs, is absurd.

III. The third branch of the *leges non scriptæ* are those peculiar laws, which by custom are adopted and used only in certain peculiar courts and jurisdictions, *vis.* the *civil* and *canon laws*.

There are four species of courts, in which the civil and canon laws are permitted (under different restrictions) to be used: 1. The ecclesiastical courts; 2. The military courts; 3. The courts of admiralty; 4. The courts of the two universities. In all, their reception in general, and the different degrees of that reception, are grounded entirely upon custom, corroborated in the latter instance by act of parliament ratifying those charters which confirm the customary law of the universities. The courts of common law have the superintendency over these courts, to keep them within their jurisdictions. The common law has also reserved to itself the exposition of all such acts of parliament as concern either the extent of these courts or the matters depending before them; and therefore if these courts either refuse to allow these acts of parliament, or will expound them in any other sense than what the common law puts upon them, the king's courts at Westminster will grant prohibitions to restrain and controul them. And, finally, an appeal lies from all these courts to the king, in the last resort; which proves that the jurisdiction exercised in them is derived from the crown of England, and not from any foreign potentate, or intrinsic authority of their own.

Let us next proceed to the *leges scriptæ*, or WRITTEN LAWS of the kingdom. These consist in statutes, or acts of parliament, which are either *general* or *special*, *public* or *private*. Of a *public* act the courts of law are bound to take notice judicially and *ex officio*, without the statute being particularly pleaded. *Special*, or *private* acts, are rather exceptions than rules, being those which only operate upon particular persons and private concerns; and of these the judges are not bound to take notice, unless they be formally pleaded. Thus, to shew the distinction, the 13th Eliz. c. 10. to prevent spiritual persons from making leases for longer terms than twenty-one years, or three lives, is a public act, it being a rule prescribed to the whole body of spiritual persons in the nation: but an act to enable the bishop of Chester to make a lease to A.B. for sixty years, is an exception to this rule; it concerns only the parties and the bishop's successors, and is therefore a private act.

Statutes, also, are either *declaratory* of the common law, or *remedial* of some defects therein. *Declaratory*, where the old custom of the kingdom is almost fallen into disuse, or become disputable; in which case parliament has thought proper, *in perpetuum rei testimonium*, and for avoiding all doubts and difficulties, to declare what the common law is and ever hath been. Thus, the Statute of Treasons, 25 Edw. III. c. 2. doth not make any new species of treason; but only, for the benefit of the subject, declares and enumerates those several kinds of offences which before were treason at the common law. *Remedial* statutes are those which are made to supply such defects, and abridge such superfluities, in the common law, as arise either from the general imperfection of all human laws, from change of time and circumstances, from the mistakes of judges, or from any other cause. And this being done either by enlarging the common law where it was too narrow and circumscribed, or by restraining it where it was too lax and luxuriant, hath occasioned another subordinate division of remedial acts of parliament into *enlarging* and *restraining* statutes.

With regard to the construction of acts of parliament, there are three points to be considered—the old law, the mischief, and the remedy; that is, how the common law stood at the making of the act; what the mischief was, for which the common law did not provide; and what remedy the parliament hath provided to cure this mischief. And it is the business of the judges so to construe the act, as to suppress the mischief, and advance the remedy. A statute which treats of things or persons of an inferior rank cannot, by any general words, be extended to those of a superior. Thus, a statute treating of “deans, prebendaries, parsons, vicars, and others having spiritual promotion,” is held not to extend to bishops though they have spiritual promotion; deans being the highest persons named, and bishops being of a still higher order. Penal statutes must be construed strictly: but statutes against frauds are to be liberally and beneficially ex-

pounded. This may seem a contradiction ; most statutes against frauds being in their consequences penal. But this difference is here to be taken : where the statute acts upon the offender, and inflicts a penalty, as the pillory or a fine, it is then to be taken strictly ; but when the statute acts upon the offence, by setting aside the fraudulent transaction, here it is to be construed liberally. One part of the statute must be so construed by another, that the whole may (if possible) stand : but a saving totally repugnant to the body of the act is void. Where the common law and a statute differ, the common law gives place to the statute ; and an old statute gives place to a new one : and this upon a general principle of universal law, that *Leges posteriores priores contrarias abrogant*. But if a statute that repeals another be itself repealed afterwards, the first statute is hereby revived, without any formal words for that purpose. Acts of parliament derogatory from the power of subsequent parliaments bind not. Thus, the 11 Hen. VII. c. 1. which directs that no person, for assisting a king *de facto*, shall be attainted of treason by act of parliament or otherwise, is held to be good only as to common prosecutions for high treason, but will not restrain or clog any parliamentary attainder. Lastly, acts of parliament that are impossible to be performed are of no validity ; and if there arise out of them collaterally any absurd consequences, manifestly contradictory to common reason, they are, with regard to those collateral consequences, void. But when the words of a statute are of doubtful signification, general usage may be called in to explain them.

These are the several grounds of the laws of England ; over and above which, equity is also frequently called in to assist, to moderate, and to explain them. We shall therefore only add, that there are also peculiar courts of equity established for the benefit of the subject ; to detect latent frauds and concealments, which the process of the courts of law is not adapted to reach ; to enforce the execution of such matters of trust and confidence, as are binding in conscience, though not cognizable in a court of law ; to deliver from such dangers as are owing to misfortune or oversight ; and to give a more specific relief, and more adapted to the circumstances of the case, than can always be obtained by the generality of the rules of the positive or common law. This is the business of the courts of equity, which, however, are only conversant in matters of property, for the freedom of the constitution will not permit that in criminal cases a power should be lodged in any judge to construe the law otherwise than according to the letter. This caution, while it protects the common liberty, can never bear hard upon individuals. A man cannot suffer *more* punishment than the law assigns, but he may suffer *less*. The law cannot be strained by partiality to inflict a penalty beyond what the letter will warrant : but, in cases where the letter induces any apparent hardship, the crown has the power to pardon.

BOOK I.

OF CIVIL INJURIES, AND THEIR REMEDIES.

THE objects of the laws of England are defined by Blackstone to be, the enforcement of right, and the prohibition of wrong; and he treats of them under the following divisions: 1. The Rights of Persons; 2. The Rights of Things; 3. Private Wrongs; 4. Public Wrongs. We shall not, however, exactly follow the order he has laid down, but shall proceed to the consideration of PRIVATE WRONGS, or CIVIL INJURIES, with the means of redressing them; first premising, that all civil injuries are of two kinds: the one without force or violence, as slander, or breach of contract; the other with force and violence, as assaults, batteries, false imprisonment: which latter partake somewhat of the criminal kind, being attended with a violation of the peace; for which, in strictness of law, a fine ought to be paid to the king, as well as satisfaction made to the injured party.

CHAPTER I.

Of Assault and Battery.

ALL injuries affecting the personal security of individuals are directed either against their lives, their limbs, their bodies, or their reputations. As to those injuries which affect the *life* of man, we shall reserve them for a distinct consideration, being one of the most atrocious species of crime. The two next, *viz.* those affecting the *limbs* and *bodies* of individuals, we shall consider in one and the same view, and make them the subject of the present chapter. These injuries may be committed—

1. By *threats* and menaces of bodily hurt, through fear of which a man's business is interrupted. The remedy for this is in pecuniary damages, to be recovered by action of trespass *vi et armis*; this being an inchoate, though not absolute violence.

2. By *assault*; which is an attempt or offer to beat another, without touching him; as by holding up one's fist at him in a menacing manner; striking at another with a cane or stick, though the party miss his aim; presenting a gun, when loaded, at a person; drawing a sword or bayonet; throwing a bottle or glass, with intent to wound or strike. All these denote at the time an intention of doing an injury, and are each considered as an inchoate violence, amounting considerably higher than bare threats; and therefore,

though no actual suffering is proved, yet the party injured may have redress by action of trespass *vi et armis*, wherein he shall recover damages, as a compensation for the injury.

3. By *battery*; which is the unlawful beating of another. The least touching of another's person wilfully, or in anger, is a battery; every man's person being sacred, and no other having a right to meddle with it in any the slightest manner. But battery is in some cases justifiable, or lawful: as where one who hath authority, a parent or master, gives moderate correction to his child, his scholar, or his apprentice. So also, on the principle of self defence, if one strike me first, or even only assault me, I may strike in my own defence; and if sued for it, may plead *son assault demesne*, or that it was the plaintiff's own original assault that occasioned it. So likewise, in defence of my goods or possessions, if a man endeavour to deprive me of them, I may justify laying hands upon him to prevent him; and in case he persist with violence, I may proceed to beat him away. Thus, too, in the exercise of an office, as that of churchwarden or beadle, a man may lay hands upon another to turn him out of the church, and prevent his disturbing the congregation; and, if sued for this or the like battery, he may set forth the whole case, and plead that he laid hands upon him gently, *molliter manus imposuit*, for this purpose. On account of these causes of justification, battery is defined to be the *unlawful* beating of another; for which the remedy is, as for assault, by action of trespass *vi et armis*; wherein the jury will give adequate damages.

4. By *wounding*; which consists in giving another some dangerous hurt; and is only an aggravated species of battery.

5. By *mayhem*; which is an injury still more atrocious, and consists in violently depriving another of the use of a member proper for his defence in fight. This is a battery, attended with this aggravating circumstance, that thereby the party injured is for ever disabled from making so good a defence against future external injuries, as he otherwise might have done. Among these defensive members are reckoned not only arms and legs, but a finger, an eye, and a fore-tooth, and also some others. But the loss of one of the jaw-teeth, the ear, or the nose, is no mayhem at common law; as they can be of no use in fighting. The same remedial action of trespass *vi et armis* lies also to recover damages for this injury. If the ear be cut off, treble damages are given by 37 Hen. VIII. c. 6. though this is not mayhem at common law.

Besides these remedies, the 43 Geo. III. c. 58. enacts, if any person shall wilfully and maliciously stab or cut any of his majesty's subjects, with intent to murder, maim, disfigure, or disable him, or to do him some grievous bodily harm, or with intent to resist or prevent the apprehension and detainer of the person so stabbing or cutting, or of any of his accomplices, for offences for which they might be lawfully apprehended, he, his counsellors, aiders, and abettors, shall be guilty of felony without

benefit of clergy : provided, that if such acts of stabbing or cutting were committed under circumstances, that, if death should ensue, the same would not in law amount to the crime of murder, then the person so indicted shall be acquitted. This act also extends the penalties to those who are guilty of maliciously shooting at another.

CHAPTER II.

Of Slander.

SLANDER is a civil injury which arises by any thing which affects a man's reputation or good name, and for which an action of damages will lie, as by malicious, scandalous, and slanderous words, tending to his damage and derogation. As, if one man maliciously and falsely utter any slander or false tale of another, which, if true, would be punishable by law ; as to say, that a man has poisoned or murdered another, or is perjured ; or which may exclude him from society, by charging him with having a contagious disorder, as the leprosy, the plague, the lues venerea ; or which may impair his trade, profession, or livelihood, as to call a tradesman a bankrupt, a physician a quack, a lawyer a knave.

Words spoken in derogation of a peer, a judge, or other great officer of the crown, which are called *scandalum magnatum*, are held to be still more heinous ; and though they be such as would not be actionable in the case of a common person, yet in this case they amount to an atrocious injury. Words also tending to scandalize a magistrate, or a person in a public trust, are deemed more criminal than in the case of a private man. And it is now held, that for the scandalous words in all the cases we have mentioned, an action on the case may be had, even before the injury has been sustained, and upon the mere probability that it might have happened.

In order to sustain this action, it is essentially necessary that the words should contain an imputation which, if true, would subject the party calumniated to the penalties of the criminal law. But an imputation of the mere defect or want of moral virtue, or moral duties or obligations, is not sufficient. To call a man a thief, unless it be intended to impute felony to him, is not actionable. Hence, where that expression is accompanied with other words, which clearly denote that the speaker did not intend to impute felony to the party charged, no action will lie.

With regard to words that do not thus apparently, and upon the face of them, import such defamation as will of course be injurious, it is necessary that the plaintiff should aver some particular damage to have happened, which is called laying his action with a *per quod*. As, if I say that such a clergyman is a bastard, he cannot for this bring any action against me, unless

he can shew some special loss by it ; in which case he may bring his action against me, for saying he was a bastard, *per quod* he lost the presentation to such a living. In like manner, to slander another man's title, by spreading such injurious reports as, if true, would deprive him of his estate (as to call the issue in tail, or one who hath land by descent, a bastard), is actionable, provided any special damage accrue to the proprietor thereby ; as if he lose an opportunity of selling the land.

Scandalous words, whether spoken before a man's face, or behind his back, by way of affirmation or report, in jest or earnest, whether sober or drunk, &c. are actionable ; and so they are, whether the words be spoken directly or indirectly, or obliquely ; and though they are pronounced in any foreign language, if understood : but where they can have a double interpretation, they shall be taken in the mildest sense, that no action shall lie.

If one say, that another said a third person did a certain scandalous thing, such third person may have his action of slander against the first man, with an averment that the second never said so, whereby the first is the author of the scandal. In case the slander proceed from a man's wife, the husband and wife must be sued for it, and not she alone. And for any scandal against the wife, he and she are to bring the action ; but for words against both a man and his wife, the husband may prosecute one action for his slander, and he and his wife may afterwards sue another action for her's.

Mere scurrility, or opprobrious words, which neither in themselves import, nor are in fact attended with any injurious effects, will not support an action. So, scandals which concern matters merely spiritual, as to call a man *heretic* or *adulterer*, are cognizable only in the ecclesiastical court ; unless any temporal damage ensue, which may be a foundation for a *per quod*. Words of heat and passion, as to call a man *rogue* and *rascal*, productive of no ill consequence, and not of any of the dangerous species before mentioned are not actionable. Neither are words spoken in a friendly manner, as by way of advice, admonition, or concern, without any tincture or circumstance of ill-will ; for, in both these cases, they are not *maliciously* spoken, which is part of the definition of slander. Neither are any reflecting words made use of by counsel in legal proceedings, and pertinent to the cause in hand, a sufficient cause of action for slander.

When the words are utterly uncertain, no *inuendo* or averment can make them good : and to these actions the defendant may plead the general issue, Not guilty ; or, if the plaintiff declare on some of the words only, when altogether they are not actionable, the defendant may set them forth at large as he spoke them, and traverse or justify the whole, &c. Also if the defendant can make proof of the words, he may plead special justification ; but if the plea be not made good, the damages will be greatly aggravated.

CHAPTER III.

Of Libel.

THERE is another species of civil injuries which affect a man's reputation, and that is, by printed or written libels, pictures, signs, and the like, by which means a person is exposed to public hatred, contempt, and ridicule. The direct tendency of libels is a breach of the public peace, by stirring up the objects of them to revenge, or perhaps to bloodshed.

The communication of a libel to any one person is a publication in the eye of the law; and therefore, the sending an abusive private letter to a man is as much a libel as if it were openly printed, for it equally tends to a breach of the peace. For the same reason, it is immaterial, with respect to the essence of a libel, whether the matter of it be true or false, since the provocation, and not the falsity, is the thing to be punished criminally; though, doubtless, the falsehood of it may aggravate its guilt, and enhance its punishment. In a *civil* action, however, a libel must appear to be false, as well as scandalous; for if the charge be true, the plaintiff has received no private injury, and has no ground to demand a compensation for himself, whatever offence it may be against the public peace: and therefore, upon a civil action, the truth of the accusation may be pleaded in bar of the suit. But, in a *criminal* prosecution, the tendency which all libels have to create animosities, and to disturb the public peace, is the whole that the law considers: and therefore, in such prosecutions, the only points to be inquired into are, first, the making or publishing of the book or writing; and, secondly, whether the matter be criminal: and if both these points be against the defendant, the offence against the public is complete. The punishment of libellers, for either making, repeating, printing, or publishing a libel, is fine, and such other punishment as the court in its discretion shall inflict; regarding the quantity of the offence, and the quality of the offender.

It has been held, that the truth of a libel is no justification in a criminal prosecution, yet, in many instances, it is considered as an extenuation of the offence; and the Court of King's Bench has laid down this general rule, *viz.* that it will not grant an information for a libel, unless the prosecutor who applies for it make an affidavit, asserting directly and pointedly that he is innocent of the charge imputed to him. But this rule may be dispensed with, if the person libelled reside abroad, or if the imputations of the libel are general and indefinite, or if it is a charge against the prosecutor for language which he has held in parliament.

This species of defamation, *viz.* libel, is usually termed written scandal, and is considered the more offensive, inasmuch as it is presumed to have been entered upon with coolness and deliberation, and is propagated wider than any other scandal.

The important distinction between libels and words spoken was fully established in the case *Villars v. Mousely*. As there is a difference between the malignity and injurious consequences of slanderous words spoken or written, many words, which if spoken would not be actionable, are actionable if uttered in the way of libel. In the above case it was decided, that whatever renders a man ridiculous, or lowers him in the esteem and opinion of the world amounts to a libel; though the same expression, if spoken, would not have been defamation. Hence the word *swindler*, if spoken of another (unless it be spoken in relation to his trade or business), is not actionable: but if it be published in the way of libel, it is so. Also, the publication of a letter, containing some verses in which the plaintiff was called an *itchy old toad*, was deemed a libel.

The publication of a letter, in which the plaintiff was stated to be "one of the most infernal villains that ever disgraced human nature," has been held to be actionable, without proof of special damage.

It is no libel where a writing inveighs against mankind in general, or against a particular order of men; it must descend to particulars and individuals.

Defamation by libel, as by scandalous writing, &c. is actionable; and printing or writing may be libellous, though the scandal be not charged in direct terms, but ironically, or though there be only the first and last letter of the name, if the jury will find it to point at a particular person: and the person who is the author or contriver, and the procurer and publisher of a libel, knowing it to be such, are all punishable; as are booksellers, &c. who sell libels, although they know not the contents thereof. And the sale of a libel by a servant in the shop is *prima facie* evidence of publication in a prosecution against the master; and is sufficient for conviction, unless contradicted by contrary evidence, shewing that he was not privy, nor in any degree assenting to it.

It had frequently been determined by the Court of King's Bench, that the only questions for the consideration of the jury in criminal prosecutions for libels were, the fact of publication, and the truth of the innuendoes, that is, the truth of the meaning and sense of the passages of the libel, as stated and averred in the record; and that the judge or court alone were competent to determine whether the subject of the publication was or was not a libel. (See the case of the Dean of St. Asaph, 3 *T.R.* 428.) But the legality of this doctrine having been much controverted, the 32 Geo. III. c. 60. commonly called Mr. Fox's bill, was passed, entitled, "An act to remove doubts respecting the functions of juries in cases of libels;" which declares and enacts, that, on every trial of an indictment or information for a libel, the jury

may give a general verdict of Guilty, or Not Guilty, upon the whole matter in issue, and shall not be required or directed by the judge to find the defendant guilty merely on the proof of the publication of the paper charged to be a libel, and of the sense ascribed to it on the record. But the statute provides, that the judge may give his opinion to the jury respecting the matter in issue, and the jury may, at their discretion, as in other cases, find a special verdict; and the defendant, if convicted, may move the court, as before the statute, in arrest of judgment.

A general reflection on the government has been deemed libellous, though no particular person has been reflected upon; and the writing against the known law and religion of the country, for the purpose of bringing them into contempt, is clearly a libel.

A comment upon a literary production, exposing its follies and errors, and holding up the author to ridicule, will not be deemed a libel, provided such comment do not exceed the limits of fair and candid criticism, by attacking the character of the writer unconnected with his work. For if a person, under pretence of criticising a literary work, defame the private character of the author, and, instead of writing in the spirit, and for the purpose, of fair and candid discussion, travel into collateral matter, and introduce facts not stated in the work, accompanied with injurious comments upon them, such person is a libeller, and liable to an action.

Printing or writing may be libellous, though the scandal be not directly charged, but obliquely and ironically.

It has been held, that it is not competent for a man charged with a libel to urge that one similar to that for which he is prosecuted, was published on a former occasion by other persons, who were never prosecuted.

In the making of libels, if one man dictate, and another write, both are deemed guilty.

It has been laid down by great legal authorities, that truth is no justification for a libel; and a very learned writer seems to doubt whether such a plea would now be admitted by the courts, if the accusation in the libel did not amount to an indictable offence. But this doctrine may be questioned; and it is highly probable, that in an action for libel, if specific instances can be stated on the record, and proved by evidence, so as to support the general charge of the libel, the courts would determine them to be a sufficient justification of the defendant. But the chief excellence of the civil action for libel consists in the opportunity it affords the person traduced of vindicating his innocence, as well as receiving a reparation for the injury sustained.

If an action be brought for a libel written in a foreign language, the original with the translation must be stated in the declaration.

By the 60 Geo. III. c. 8. § 1. in any verdict, or judgment by default, had against any person for composing, printing, or publishing any blasphemous libel, or any seditious libel tending to bring into hatred and contempt the person of his majesty, his heirs or successors, or the regent, or the government and constitution

of the United Kingdom as by law established, or either house of parliament, or to excite his majesty's subjects to attempt the alteration of any matter in church or state as by law established, otherwise than by lawful means, the judge or court may order the seizure of all copies of the libel; and the officers are empowered to enter by force, in the day-time, any premises containing any copies of the same.

But in case judgment shall be arrested, or if, after judgment shall have been entered, the same shall be reversed upon writ of error, all copies so seized shall be forthwith returned, free of all charge and expence, and without the payment of any fees. § 2.

By the third section, the same provisions are made to extend to the justiciary court of Scotland.

Persons found guilty a second time of printing or publishing blasphemous or seditious libels are liable to be banished from all parts of his majesty's dominions for any term of years the court shall think fit, besides being subject to the same punishment as may be inflicted in cases of high misdemeanor. § 4.

And any person being found in any part of his majesty's dominions forty days after sentence of banishment passed, shall be transported for any time not exceeding fourteen years. § 5.

By the 10th clause it is provided, that this act shall not alter the law or practice of Scotland regarding the punishment of persons convicted of composing, printing, publishing, or circulating any blasphemous or seditious libel.

CHAPTER IV.

Of Malicious Prosecutions.

ANOTHER injury affecting the persons of individuals is by preferring malicious indictments or prosecutions against them. For this the law has provided an adequate remedy in damages; either by an action of conspiracy, which must be brought against two persons at the least; or, which is the most usual way, by a special action on the case for a false and malicious prosecution. But it is not actionable, where a civil action is brought against a man, though there is no ground for it; because it is a claim of right. For suing a man in the ecclesiastical court for matters not cognizable there, an action will lie; and for prosecuting an indictment falsely it will lie, though the indictment were bad, or not found by the grand jury. And in all cases, it is necessary to prove that the prosecution was instituted from malice, and without any probable cause, and that the plaintiff sustained an injury by the malicious prosecution, either in his person by imprisonment, his reputation by the scandal, or in his property by the expence. It has also been held, that an action will lie for maliciously holding a party to bail, either where there is not any

debt due, or where the party is held to bail for a larger sum than is really due.

In the case *Bishop v. Rice*, at the Hereford assizes, March 25th, 1824, Mr. Justice Park said, that in order to support an action for malicious prosecution two circumstances must concur—malice, and want of probable cause; neither of which alone would suffice: for if a prosecutor were actuated by the most diabolical malice, and yet had reasonable grounds to warrant him, he was not liable; neither was he, if he had no sufficient grounds, and yet acted fairly, and without improper motives. It was not necessary, however, for the complainant to prove malice by express words or threats; but the jury would infer it from the total want of probable cause, if they considered the charge so groundless, that it must have been malicious. The existence or non-existence of probable cause was a question of law for the judge; but it was a question arising on facts which the jury were to investigate.

An action will also lie for maliciously suing out a commission of bankruptcy against a person, which is afterwards superseded.

And it may be observed generally, that the action on the case for a malicious prosecution varies in its form as the circumstances of each particular grievance may require. Whatever engines of the law malice may employ to injure individuals, whether in the shape of indictment or information, which charge a party with crimes injurious to his fame and reputation, and tend to deprive him of his liberty; or, in short, whether such malice is shewn by malicious arrests, or by exhibiting groundless accusations; this action on the case will always afford an adequate remedy.

In an action for a malicious prosecution, where the plaintiff has been indicted for a felony, it is necessary to produce a copy of the record granted by the court before which he was acquitted; but it is otherwise in misdemeanors, where the action may be sustained by the production of the original record of the acquittal.

CHAPTER V.

Of False Imprisonment.

THE next injury to the persons of individuals which we are to consider, is that of false imprisonment.

To constitute this injury, there are two points requisite:—

1. The detention of the person; and, 2. The unlawfulness of such detention. Every confinement of the person is an imprisonment, whether it be in a common prison, or in a private house, or in the stocks, or even by forcibly detaining one in the public streets. Unlawful or false imprisonment consists in such confinement or detention without sufficient authority: lawful authority may arise either from some process from the courts of justice; or from some warrant from a legal officer, having power to commit under his

hand and seal, and expressing the cause of such commitment: or from such other special cause, warranted from the necessity of the thing, either by common law, or act of parliament; such as the arresting of a felon by a private person without warrant, the impressing of mariners for the public service, or the apprehending of waggoners for misbehaviour in the public highways. False imprisonment may arise by executing a lawful warrant or process at an unlawful time, as on a Sunday; for the statute hath declared, that such service or process shall be void.

The means of removing the injury of false imprisonment is by the writ of *habeas corpus*, the most celebrated writ in the English laws, and of which there are various kinds made use of by the courts at Westminster, for removing prisoners from one court into another, for the more easy administration of justice. Such is the *habeas corpus ad respondendum*, when a man hath a cause of action against one who is confined by the process of some inferior court, in order to remove the prisoner, and charge him with this new action in the court above. Such is that *ad satisfaciendum*, when a prisoner hath judgment against him in an action; and the plaintiff is desirous to bring him up to some superior court to charge him with process of execution. Such also are those of *ad prosequendum*, *testificandum*, *deliberandum*, &c. which issue when it is necessary to remove a prisoner, in order to prosecute or bear testimony in any court, or to be tried in the proper jurisdiction wherein the fact was committed. Such is, lastly, the common writ of *ad faciendum et recipiendum*, which issues out of the courts at Westminster Hall, when a person is sued in some inferior jurisdiction, and is desirous to remove the action into the superior courts; commanding the inferior judges to produce the body of the defendant, together with the day and cause of his caption and detainer, whence the writ is frequently denominated an *habeas corpus cum causâ*, to do and receive whatsoever the king's court shall consider in that behalf. This is a writ grantable of common right without any motion in court; and it instantly supersedes all proceedings in the court below. But, in order to prevent the surreptitious discharge of prisoners, it is ordered by 1 & 2 W. & M. c. 13. that no *habeas corpus* shall issue to remove any prisoner out of any gaol, unless signed by some judge of the court out of which it is awarded. And by 11 Geo. III. c. 70. no cause under the value of ten pounds shall be removed by *habeas corpus* or otherwise into any superior court, unless the defendant removing the same shall give special bail for payment of the bill and costs.

But the great and efficacious writ, in all manner of illegal confinement, is that of *habeas corpus ad subjiciendum*; directed to the person detaining another, and commanding him to produce the body of the prisoner, with the day and cause of his caption and detention, *ad faciendum, subjiciendum, et recipiendum*, to do, submit to, and receive whatsoever the judge or court awarding such writ shall consider in that behalf.

In the King's Bench and Common Pleas, it is necessary to apply for this writ by motion to the court, as in the case of all other

prerogative writs (*certiorari*, prohibition, *mandamus*, &c.) which do not issue as of mere course, without shewing some probable cause why the extraordinary power of the crown is called in to the party's assistance. On the other hand, if a probable ground be shewn, that the party is imprisoned without just cause, and therefore ~~shall~~ a right to be delivered, the writ of *habeas corpus* is then a writ of right, "which may not be denied, but ought to be granted to every man that is committed, or detained in prison, or otherwise restrained, though it be by the command of the king, the privy council, or any other."

By 56 Geo. III. c. 90. it is provided, that where any person shall be confined (otherwise than for some criminal matter, and except persons imprisoned for debt, or by process in any civil suit) within England, Wales, or Berwick-upon-Tweed, or the isles of Jersey, Guernsey, or Man, it shall be lawful for one of the barons of the exchequer, as well as for any one of the justices of one bench or the other, in England or Ireland, to award in vacation time, a writ of *habeas corpus ad subjiciendum*, to be directed to the person in whose custody the person so confined shall be, returnable immediately before the person awarding the same, or any other judge of the court. § 1.

If the person to whom any writ of *habeas corpus* shall be directed, shall wilfully neglect or refuse to make a return, he shall be guilty of a contempt of court, and may be bound over to answer such contempt in the ensuing term: but if the writ shall be awarded so late in the vacation, that obedience thereto cannot be conveniently paid during such vacation, the same may be made returnable in court at a day certain in the next term; also, if the writ shall be awarded by the Court of King's Bench, Common Pleas, or Exchequer (which last court shall have like power to award such writs), but so late that, in the judgment of the court, obedience thereto cannot be conveniently paid during such term, the same shall, at the discretion of the court, be made returnable at a day certain in the then next vacation, before any justice or baron of the same court, who shall proceed thereupon, in such manner as by this act is directed concerning writs issuing during the vacation. § 2.

In all cases, although the return shall be good and sufficient in law, it shall be lawful for the justice or baron to proceed to examine into the truth of the facts set forth in such return; and if it shall appear doubtful to him whether the material facts set forth in the said return be true or not, he may let to bail the person so confined, upon his entering into recognizance with one or more sureties, or, in case of infancy or coverture, or other disability, upon security by recognizance, in a reasonable sum, to appear in court upon a day certain in the term following, and so from day to day as the court shall require, and to abide such order as it shall make. § 3.

The like proceeding may be had in the court for controverting the truth of the return, although such writ shall be awarded by the court itself, or be returnable therein. § 4.

A writ of *habeas corpus*, according to this act, may run into any

county palatine, or cinque-port, or other privileged place, within England, Wales, Berwick-upon-Tweed, Jersey, Guernsey, and Man, and also into any port, harbour, road, creek, or bay, upon the coast of England or Wales, although the same should lie out of the body of any county; and if in Ireland, the same may run into any port, harbour, road, creek, or bay, although the same should not be in the body of any county. § 5.

By the 31 Car. II. c. 2. (the Habeas Corpus Act) it is enacted—

1. That, on complaint and request in writing by or on behalf of any person committed, and charged with any crime, (unless committed for treason or felony, expressed in the warrant, or as accessory, or on suspicion of being accessory before the fact to any petit treason or felony; or upon suspicion of such petit treason or felony, plainly expressed in the warrant; or unless he is convicted or charged in execution by legal process), the lord chancellor, or any of the twelve judges in vacation, upon viewing a copy of the warrant, or affidavit that a copy is denied, shall (unless the party have neglected for two terms to apply to any court for his enlargement) award a *habeas corpus* for such prisoner, returnable immediately before himself or any other of the judges; and, upon the return made, shall discharge the party, if bailable, upon giving security to appear and answer to the accusation in the proper court of judicature.

2. That such writs shall be indorsed, as granted in pursuance of this act, and signed by the person awarding them.

3. That the writ shall be returned, and the prisoner brought up within a limited time, according to the distance, not exceeding in any case twenty days.

4. That officers and keepers neglecting to make due returns, or not delivering to the prisoner or his agent, within six hours after demand, a copy of the warrant of commitment, or shifting the custody of a prisoner from one to another (without sufficient reason or authority specified in the act), shall for the first offence forfeit 100*l.* and for the second offence 200*l.* to the party grieved, and be disabled to hold his office.

5. That no person, once delivered by *habeas corpus*, shall be recommitted for the same offence, on penalty of 500*l.*

6. That every person committed for treason or felony shall (if he require it) the first week of the next term, or the first day of the next session of oyer and terminer, be indicted in that term or session, or else admitted to bail; unless the king's witnesses cannot be produced at that time; and, if acquitted, or if not indicted and tried in the second term or session, he shall be discharged from his imprisonment for such imputed offence. But that no person, after the assizes shall be open for the county in which he is detained, shall be removed by *habeas corpus* till after the assizes are ended, but shall be left to the justice of the judges of assize.

7. That any such prisoner may move for and obtain his *habeas corpus*, as well out of the Chancery or Exchequer, as out of the King's Bench or Common Pleas; and the lord chancellor or

judges denying the same, on sight of the warrant, or oath that the same is refused, forfeit severally to the party grieved the sum of 500*l*.

8. That this writ of *habeas corpus* shall run into the counties palatine, cinque ports, and other privileged places, and the islands of Jersey and Guernsey.

9. That no inhabitant of England (except persons contracting, or convicts praying to be transported; or having committed some capital offence in the place to which they are sent) shall be sent prisoner to Scotland, Ireland, Jersey, Guernsey, or any places beyond the seas, within or without the king's dominions; on pain that the party committing, his advisers, aiders, and assistants, shall forfeit to the party grieved a sum not less than 500*l*. to be recovered with treble costs; shall be disabled to bear any office of trust or profit; shall incur the penalties of *præmunire*; and shall be incapable of the king's pardon.

This important statute extends (we may observe) only to the case of commitments for such criminal charges as can produce no inconvenience to public justice by a temporary enlargement of the prisoner; all other cases of unjust imprisonment being left to the *habeas corpus* at common law. But even upon writs at the common law it is now expected by the court, agreeable to ancient precedents and the spirit of the act of parliament, that the writ should be immediately obeyed, without waiting for any *alias* or *pluries*; otherwise an attachment will issue. By which admirable regulations, judicial as well as parliamentary, the remedy is now complete for removing the injury of unjust and illegal confinement.

Besides the efficacy of the writ of *habeas corpus* in liberating the subject from illegal confinement in a public prison, it also extends its influence to remove every unjust restraint of personal freedom in private life, though imposed by a husband or a father; but when women or infants are brought before the court by a *habeas corpus*, the court will only set them free from an unmerited or unreasonable confinement, and will not determine the validity of a marriage, or the right of the guardianship, but will leave them at liberty to choose where they will go; and if there be any reason to apprehend that they will be seized in returning from the court, they will be sent home under the protection of an officer. But if a child be too young to have any discretion of its own, then the court will deliver it into the custody of its parent, or the person who appears to be its legal guardian.

If an equivocal return be made to a *habeas corpus*, the court will immediately grant an attachment.

The satisfactory remedy for this injury of false imprisonment is by an action of trespass *vi et armis*, usually called an action of false imprisonment; which is generally, and almost unavoidably, accompanied with a charge of assault and battery also; and therein the party shall recover damages for the injury he has received; and also the defendant is, as for all other injuries committed with force, or *vi et armis*, liable to pay a fine to the king for the violation of the public peace.

CHAPTER VI.

Of Abduction and Adultery.

HAVING considered the injuries which affect individuals in their own persons, and shewn the different remedies for them, we are next to treat of those which may affect them in their relationship to others, and for which the law has provided an adequate remedy: and, first, with regard to husband and wife. The injuries that may be offered to a person considered as a husband are principally these: *abduction*, or taking away his wife; *adultery*, or criminal conversation with her; and *beating*, or otherwise abusing her.

1. As to the first sort, *abduction*, or taking her away, this may either be by fraud and persuasion, or open violence, though the law in both cases supposes force and restraint, the wife having no power to consent, and therefore gives a remedy by writ of *ravish*, or action of trespass *vi et armis*. This action lay at the common law; and thereby the husband may recover, not the possession of his wife, but damages for taking her away; and by Westm. 1. 3 Edw. I. c. 13. the offender may also be imprisoned two years, and be fined at the pleasure of the king. Both the king and the husband may have this action; and the husband is also entitled to recover damages, in an action on the case against such as persuade and entice the wife to live separate from him without sufficient cause.

2. *Adultery*, or criminal conversation with a man's wife, though it is, as a public crime, left by the laws to the coercion of the spiritual courts, yet, considered as a civil injury, the law gives a satisfaction to the husband for it by action of trespass *vi et armis* against the adulterer, wherein the damages recovered are usually very large and exemplary. This crime was severely punished by the ancient law of the land; but at the present day it belongs to the ecclesiastical courts. Several attempts, indeed, have been made to bring it within the pale of criminal jurisdiction, but without effect: and it is therefore considered by the temporal courts merely as a civil injury.

A variety of circumstances concur in regulating the *quantum* of damages in actions of *Crim. Con.*; such as the rank and quality of the plaintiff, the condition of the defendant, and his being a friend, relation, or dependent of the plaintiff; the seduction or otherwise of the wife, founded on her previous behaviour and character; and the husband's obligation, by settlement or otherwise, to provide for those children which he cannot but suspect to be spurious. And in this case, and upon indictment for polygamy, a marriage *in fact* must be proved, though generally in

other cases, reputation and cohabitation are sufficient evidence of marriage.

In mitigation of damages, evidence may be offered that the husband carried on a criminal correspondence with other women, in an open, notorious, and undisguised manner; or that he treated his wife harshly and unkindly; or that they did not live affectionately together.

A husband cannot maintain an action, if he live entirely separated from his wife in consequence of a mutual agreement; for the *gist* or foundation of the action is held to consist in the husband's loss of the comfort and society of his wife.

3. The third injury we have now to treat of is that of beating a man's wife, or otherwise ill-using her; for which, if it be a common assault, battery, or imprisonment, the law gives the usual remedy to recover damages by action of trespass *vi et armis*, which must be brought in the name of the husband and wife *jointly*: but if the beating or other mal-treatment be very enormous, so that thereby the husband is deprived for any time of the company and assistance of his wife, the law then gives him a *separate* remedy by an action of trespass, in the nature of an action upon the case, for this ill-usage.

An injury may be offered to a person considered in the relation of a *parent*, by abduction, or taking his children away: and this is remediable by a writ of ravishment, or action of trespass *vi et armis*, in the same manner as the husband may have it on account of the abduction of his wife.

Of a similar nature to the last is the relation of *guardian* and *ward*; and the like actions, *mutatis mutandis*, as are given to fathers, the guardian also has for recovery of damages, when his ward is stolen or ravished away from him.

CHAPTER VII.

Of Seduction.

IN no case whatever of seduction, unless a woman has had a promise of marriage, can she herself obtain any reparation for the injury she has sustained from her seducer. And even where her weakness and credulity have been imposed upon by the most solemn promises of marriage, unless they have been overheard or made in writing, she cannot recover any compensation, being incapable of giving evidence in her own cause.

Nor can a parent maintain an action in the temporal courts, but by proving, that, from the consequence of the seduction, his daughter is less able to assist him as a servant, or that the seducer, in the pursuit of his daughter, was a trespasser upon his premises. Hence no action can be maintained for the seduction of a daughter, which is not attended with a loss of service, or an injury to pro-

perty. Therefore, in that action for seduction which is in most general use, viz. a *per quod servitium amisit*, the father must prove that his daughter, when seduced, actually assisted in some degree, however inconsiderable, in the housewifery of his family; and that she has been rendered less serviceable to him by her pregnancy. Or, the action would probably be sustained upon the evidence of a consumption, or any other disorder contracted by the daughter in consequence of her seduction.

It is immaterial what is the age of the daughter; but it is necessary that at the time of the seduction she should be living in, or be considered part of her father's family.

In this action, as the daughter does not necessarily receive any part of the damages recovered, she is a competent witness, and is generally produced to prove the fact of the seduction. But in such cases, as in actions for adultery, the damages are estimated from the rank and situation of the parent, or from the degree of affliction which, under all circumstances, he may be supposed to suffer.

This action may be brought by a grandfather, brother, uncle, aunt, or any relation under the protection of whom, *in loco parentis*, a woman resides; especially if the case be such that she can bring no action herself.

Another action for seduction is a common action for trespass, which may be brought when the seducer has illegally entered the father's house; in which action the debauching his daughter may be stated and proved as an aggravation of the trespass. Or, where the seducer carries off the daughter from her father's house, an action might be brought for enticing away his servant.

CHAPTER VIII.

Of Distress and Replevin.

A DISTRESS, in law, is the taking of a personal chattel out of the possession of the wrong-doer into the custody of the party injured, to procure a satisfaction for the wrong committed.

The most usual injury for which a distress may be taken is that of nonpayment of rent. A distress may be taken for any kind of rent in arrear; the detaining whereof beyond the day of payment is an injury to him who is entitled to receive it.—For neglecting to do suit to the lord's court, or other personal service, the lord may distrain of common right.—For amercedments in a court-leet, a distress may be had of common right; but not for amercedment in a court-baron, without a special prescription to warrant it.—Another injury for which distress may be taken is, where a man finds beasts of a stranger wandering in his grounds *damage-feasant*, that is, doing him hurt or damage, by treading

down his grass, or the like; in which case the owner of the soil may distrain them, till satisfaction be made him for the injury.— Lastly, for several duties and penalties inflicted by special acts of parliament (as for assessments made by commissioners of sewers, or for the relief of the poor), remedy by distress and sale is given.

As to the things which may be distrained, or taken in distress, we may lay it down as a general rule, that all chattels personal are liable to be distrained, unless particularly protected or exempted. Instead, therefore, of mentioning what things are distrainable, it will be easier to recount those which are not so, with the reasons of their particular exemptions. And,

1. As every thing which is distrained is presumed to be the property of the wrong-doer, it will follow that such things wherein no man can have an absolute and valuable property (as dogs, cats, rabbits, and all animals *feræ naturæ*) cannot be distrained, yet if deer, which are *feræ naturæ*, are kept in a private inclosure, for the purpose of sale or profit, this so far changes their nature, by reducing them to a kind of stock or merchandize, that they may be distrained for rent.

2. Whatever is in the present use or occupation of any man is for the time privileged and protected from any distress; as an axe with which a man is cutting wood, or a horse while a man is riding him. But horses drawing a cart may (cart and all) be distrained for rent-arrear; and also if a horse, though a man be riding him, be taken *damage-feasant*, or trespassing in another's ground, the horse (notwithstanding his rider) may be distrained, and led away to the pound.*

3. Valuable things in the way of trade are not liable to distress; as a horse standing in a smith's shop to be shod, or in a common inn; or cloth at a tailor's house; or corn sent to a mill, or a market. For all these are protected and privileged, for the benefit of trade, and are supposed, in common presumption, not to belong to the owner of the house, but to his customers.† But, generally speaking, whatever goods and chattels the landlord finds upon the premises, whether they in fact belong to a tenant or a stranger, are distrainable by him for rent; for otherwise a door would be open to infinite frauds upon the landlord; and the stranger has his remedy over by action on the case against the tenant, if by the tenant's default the chattels are distrained, so that he cannot tender them when called upon. With regard to a stranger's beasts which are found on the tenant's land, the following distinctions are however taken. If they are put in by consent of the owner of the beasts, they are distrainable immediately afterwards for rent arrears by the landlord. So also, if a stranger's cattle break the fences, and commit a trespass by coming on the

* This is said on the authority of 1 Sid. 440. But per Hargrave "the opinion was extra-judicial, and may be questioned," (see *Co. Lit.* 47. a. n. 12; and it has since been overruled, in the case of *Storey v. Robinson*, 6 Term Rep. 138.

† This privilege, however, does not extend to horses or carriages at liberty, or cattle agisting. *Francis v. Wyatt*, 3 Burr. 1498.

land, they are distrainable immediately by the lessor for his tenant's rent, as a punishment to the owner of the beasts for the wrong committed through his negligence. But if the lands were not sufficiently fenced so as to keep out cattle, the landlord cannot distrain them till they have been *levant et couchant* on the land, that is, have been long enough there to have lain down and rose up to feed, which in general is held to be one night at least; and then the law presumes that the owner may have notice whither his cattle have strayed, and it is his own negligence not to have taken them away. Yet if the lessor, or his tenant, were bound to repair the fences, and did not, and thereby the cattle escaped into their grounds without the negligence or default of their owner; in this case, though the cattle may have been *levant et couchant*, yet they are not distrainable for rent, till actual notice is given to the owner that they are there, and he neglects to remove them.

4. There are also other things privileged by the ancient common law; as a man's tools and utensils of his trade, the axe of a carpenter, the books of a scholar, and the like. So beasts of the plough, and sheep, are privileged from distresses at common law; while dead goods, or other sorts of beasts, which Bracton calls *catalla otiosa*, may be distrained. But, as beasts of the plough may be taken in execution for debt, so they may be for distress by statute, which partakes of the nature of execution. And perhaps the true reason why these and the tools of a man's trade were privileged at the common law, was because the distress was then merely intended to compel the payment of the rent, and not as a satisfaction for its nonpayment; and therefore to deprive the party of the instruments and means of paying it, would counteract the very end of the distress. But, by modern decisions, these are held to be distrainable for rent, provided no other sufficient distress is to be had. (See *Gorton v. Faulkner*, 4 T.R. 565.) And in all cases are they distrainable for poor's rates.

5. Nothing shall be distrained for rent, which may not be recovered again in as good a plight as when it was distrained; for which reason, milk, fruit, and the like, cannot be distrained; a distress at common law being only in the nature of a pledge or security, to be restored in the same plight when the debt is paid. So, anciently, sheaves or shocks of corn could not be distrained; because some danger must needs accrue in their removal; but a cart loaded with corn might, as that could be safely restored. But now, by 2 W. & M. c. 5. corn in sheaves or shocks, or loose in the straw, or hay in barns or ricks, or otherwise, may be distrained, as well as other chattels.

6. Lastly, things fixed to the freehold may not be distrained; as cauldrons, windows, doors, and chimney-pieces, for they savour of the realty. For this reason, also, corn growing could not be distrained till the 11 Geo. II. c. 19. empowered landlords to distrain corn, grass, or other products of the earth, and to cut and gather them when ripe.

Let us next consider, how distresses may be taken, disposed of, or avoided: and, in pointing out the methods of distraining, we shall in general suppose the distress to be made for rent; and remark, where necessary, the differences between such distress and one taken for other causes.

In the first place, then, all distresses must be made *by day*, (but not until after the day on which the rent becomes due, for if the rent be paid on any part of that day, whilst a man can see to count money, the payment is good); unless in the case of *damage feasant*, an exception being there allowed, lest the beasts should escape before they are taken. And when a person intends to make a distress, he must, by himself or his bailiff, enter on the demised premises; formerly, during the continuance of the lease; but now if the tenant hold over, the landlord may distrain within six months after the determination of the lease, provided his own title or interest, as well as the tenant's possession, continue at the time of the distress.

If the lessor do not find sufficient distress on the premises, formerly, he could resort nowhere else; but now the landlord may distrain any goods of his tenant, carried off the premises clandestinely, wherever he finds them, within thirty days after, unless they have been *bond fide* sold for a valuable consideration; and all persons privy to, or assisting in such fraudulent conveyance, forfeit double the value to the landlord.

The landlord may also distrain the beasts of his tenant feeding upon any common or wastes appendant or appurtenant to the demised premises. And he may, by the assistance of the peace-officer of the parish, break open, in the day time, any place whither the goods have been fraudulently removed and locked up to prevent a distress; oath being first made, in case it be a dwelling-house, of a reasonable ground to suspect that such goods are concealed therein.

Where a man is entitled to distrain for an entire duty, he ought to distrain for the whole at once; and not for part at one time, and part at another. But if he distrain for the whole, and there be not sufficient on the premises, or he happen to mistake in the value of the thing distrained, and so take an insufficient distress, he may take a second distress to complete his remedy.

Distresses must be proportioned to the thing distrained for. By the statute of Marlbridge, 52 Hen. III. c. 4. if any man take a great or unreasonable distress for rent-arrear, he shall be heavily amerced for the same. As if the landlord distrain two oxen for twelve-pence rent, the taking of *both* is an unreasonable distress: but if there were no other distress nearer the value to be found, he might reasonably have distrained *one* of them; but for homage, fealty, or suit and service, as also for parliamentary wages, it is said that no distress can be excessive; for as these distresses cannot be sold, the owner, upon making satisfaction, may have his chattels again. The remedy for excessive distress is by a special action on the statute of Marlbridge: for an action of trespass is

not maintainable upon this account, it being no injury at the common law.

Distress must not be made after tender of payment : for if the landlord should come to distrain the goods of his tenant for rent due, the tenant may, before the distress, tender the arrears ; and if a distress be taken after that, it is wrong. If the landlord have distrained, and the tenant before the impounding thereof should tender the arrears, the landlord ought to deliver the distress ; and if he do not, the detainer is unlawful. Even so it is for a distress for *damage feasant* : the tender of amends before the distress makes the distress unlawful ; and after the distress, if before the impounding, the detainer is unlawful. But in this case, though the owner should tender sufficient amends, he cannot take his beast out of the pound, if the amends be refused ; but he must replevy : and should it be found at the trial, that the amends were not sufficient, the persons on whom they trespassed shall have damages ; if the amends offered were sufficient, the owner of the beast shall have damages.

When the distress is taken, the next consideration is the disposal of it. For which purpose, the things distrained must in the first place be carried to some pound, and there impounded by the taker. But in their way thither, they may be *rescued* by the owner, in case the distress was taken without cause, or contrary to law ; as, if no rent be due, if they were taken upon the highway, or the like ; in these cases the tenant may lawfully make rescue. But if they once be impounded, even though taken without any cause, the owner may not break the pound, and take them out ; for they are then in the custody of the law.

A pound (*parcus*, which signifies any inclosure) is either pound *ouvert*, that is, open over-head, or pound *covert*, that is, close. By the 1 & 2 W. & M. c. 12. no distress of cattle can be driven out of the hundred where it is taken, unless to a pound overt within the same shire, and within three miles of the place where it was taken. This is for the benefit of the tenants, that they may know where to find and replevy the distress.

By the 56 Geo. III. c. 50. to regulate the sale of farming stock taken in execution, it is enacted, that no sheriff or other officer shall, by virtue of any process, carry off, or sell, or dispose of, for the purpose of being carried off from any lands let to farm, any straw threshed or unthreshed, or any straw of crops growing, or any chaff, colder, or any turnips, or any manure, compost, ashes, or sea-weed, in any case whatsoever ; nor any hay, grass or grasses, whether natural or artificial, nor any tares or vetches, nor any roots or vegetables, being the produce of such lands, in any case where, according to any covenant or written agreement entered into for the benefit of the landlord, such hay, grass or grasses, tares and vetches, roots or vegetables, ought not to be taken off from such lands, or which, by the tenor of such covenants, ought to be used thereon, and of which such sheriff or officer shall have received a written notice before sale. § 1.

The tenant shall, on having knowledge of such process, give a

written notice to the sheriff or officer of such covenants, and also of the name and residence of the landlord; and such sheriff or officer shall forthwith, and before sale, send a notice by the general post to the landlord, and also to the known steward or agent of such landlord, stating the fact of possession having been taken; and such sheriff or officer shall, in all cases of the absence or silence of such landlord or his agent, postpone the sale until the latest day he lawfully can. § 2.

But the sheriff or officer may dispose of any crops hereinbefore mentioned to any person who shall agree in writing to use the same on such lands, in such manner as shall accord with the custom of the country; and in cases where any covenant or agreement shall be shewn, then according to such covenant; and after such sale, so qualified, it shall be lawful for such persons to use all such necessary barns, stables, buildings, outhouses, yards, and fields, for the purpose of consuming such crops, as such sheriff or officer shall allot to them for that purpose, and which such tenant would have been entitled to have used for the like purpose. § 3.

And such sheriff or officer shall, on the request of any landlord aggrieved by any breach of such agreement, permit such landlord to bring any action in the name of such sheriff or officer, for the recovery of damages, such landlord having indemnified such sheriff or officer against costs. § 4.

Such sheriff or officer shall, before sale, make due inquiry within the parish, as to the name and residence of the landlord. § 5.

And in all cases where any purchaser shall have entered into any agreement with such sheriff or officer, it shall not be lawful for the landlord to distrain for rent on any corn, hay, straw, or other produce, severed from the soil, and sold, subject to such agreement, by such sheriff or officer; nor on any turnips, whether drawn or growing, if sold according to this act; nor on any horses, sheep, or other cattle, nor on any beasts whatsoever, nor on any waggons, carts, or other implements of husbandry, which any person shall employ or use for the purpose of threshing out, carrying, or consuming any such produce, under this act, and the agreement between the sheriff or officer and the purchasers of such produce. § 6.

No sheriff or officer shall sell any clover, rye-grass, or any artificial grass whatsoever, newly sown, and growing under any crop of standing corn. § 7.

But this act shall not extend to any straw, turnips, or other articles, which the tenant may remove from the farm consistently with some contract in writing. § 8.

Where any action shall be brought against such sheriff or officer, no plaintiff shall be entitled to recover any damages, unless it be proved that the breach or omission was wilful. § 9.

No sheriff or under-sheriff, nor any of their deputies, agents, bailiffs, or servants, nor any persons who shall purchase any hay, straw, chaff, turnips, grasses, or other produce before mentioned, under this act, shall be deemed to be a trespasser by reason of com-

ing upon or remaining in possession of any barns or other buildings, yards, or fields, for the purpose of threshing out or consuming any straw, hay, turnips, or other produce under this act, or for doing any thing necessary, though such acts shall have been done after the return of the process. § 10.

No assignee of any bankrupt, or any insolvent debtor's estate, nor any assignee under any bill of sale, nor any purchaser of the goods, chattels, stock, or crop of any person engaged in husbandry, on any lands let to farm, shall take, use, or dispose of any matters as aforesaid, in any other manner than such bankrupt, insolvent debtor, or person employed in husbandry, ought to have taken, used, or disposed of the same. § 11.

By the 11 Geo. II. c. 19. which was made for the benefit of landlords, any person distraining for rent may turn any part of the premises upon which a distress is taken into a pound *pro hac vice* for securing of such distress.

If a live distress of animals be impounded in a common pound overt, the owner must take notice of it at his peril; but if in any *special* pound overt, so constituted for this particular purpose, the distrainer must give notice to the owner: and in both these cases, the owner, and not the distrainer, is bound to provide the beasts with food and necessaries. But if they are put in a pound covert, as in a stable, or the like, the landlord or distrainer must feed and sustain them.

A distress of household goods, or other dead chattels, which are liable to be stolen, or damaged by the weather, ought to be impounded in a pound covert; else the distrainer must answer for the consequences.

If a person distrain beasts for *damage-feeasant*, and as he drives them towards the pound, they enter into the owner's house, and he withhold them there, and will not re-deliver them upon demand, this detainer is a rescous in law. And by the common law, if a man break the pound, or the lock of it, he is deemed guilty of a breach of the peace, and the party who distrained may take the goods again wherever he shall find them, and again impound them; and by 2 W. c. 5. on any pound breach or rescous of goods distrained for rent, the party aggrieved shall, in a special action upon the case, recover treble damages and costs against the defendant, or against the owner of the goods, if they are afterwards found to have come to his use or possession.

When impounded, the goods were formerly considered only in the nature of a pledge or security to compel the performance of satisfaction; and upon this account it hath been held, that the distrainer is not at liberty to work or use a distrained beast. And thus the law still continues with regard to beasts taken *damage-feeasant*, and distresses for suit of services; which must remain impounded till the owner make satisfaction, or contests the right of distraining by replevying the chattels.

And it has been held, that even a cow may not be milked: for though the cow be the better for this, yet he who took the distress

ought not to do good to the owner without his consent, and perhaps the owner would have come before any damage came by this to the cow; and if it perish by this, he who took the distress may distrain again; or if the distress die in the pound without any fault in the distrainor, he who made the distress may distrain again.

In all cases of distress for rent, if the tenant or owner do not, within five days after the distress is taken, and notice of the cause thereof given him, replevy the same with sufficient security, the distrainor, with the sheriff or constable, shall cause the same to be appraised by two sworn appraisers, and sell the same towards satisfaction of the rent and charges, rendering the overplus (if any) to the owner himself.

The many particulars attending the taking of a distress used formerly to make it a hazardous kind of proceeding; for if any one irregularity were committed, it vitiated the whole, and made the distrainers trespassers *ab initio*. But now, by the 11 Geo. II. c. 49. it is provided, that, for any unlawful act done, the whole shall not be unlawful, or the parties trespassers *ab initio*, but that the party aggrieved shall only have an action for the real damage sustained; and not even that, if tender of amends be made before any action is brought.

If a tenant fraudulently convey away his property for the purpose of preventing his landlord from distraining, it is lawful for the landlord, or any person lawfully empowered, within thirty days, to seize such goods (wherever they are to be found) as a distress for the rent, and to sell and dispose of them, as if the goods had been distrained upon the premises; provided, however, that if the goods have been *bonâ fide* sold to any person not privy to the fraud, they shall not be liable to be distrained.

And if any tenant shall fraudulently remove his goods, or if any person shall knowingly assist him in conveying away his goods, or any part thereof, or in concealing the same, every person so offending shall forfeit to the landlord double the value of the goods, to be recovered by action of debt in any of his majesty's courts of record.

And where the goods so fraudulently carried off shall not exceed the value of 50*l.* any two justices of the peace, upon proof had, may adjudge the offenders to pay double the value of the goods to the landlord; and, in default of payment, may levy the same by distress; and, for want of distress, the offenders may be committed to the house of correction, to be kept to hard labour for six months, unless the money be sooner paid.

If any tenant at rack rent, or where the rent reserved shall be full three-fourths of the yearly value of the demised premises, who shall be in arrear for one year, shall desert the premises, and not leave sufficient distress, two justices of the peace may, at the request of the landlord, go upon and view the same, and affix on the most conspicuous part notice in writing what day they will

return to take a second view (which day must be fourteen days afterwards at the least); and if the tenant do not then appear and pay the rent, or there shall not be sufficient distress on the premises, the justices may then put the landlord in possession, and the lease shall from thence be void. And by the 57 Geo. III. c. 52. the time of the arrears due is altered from one year to half a year.

In order to prevent excessive and ruinous charges in the execution of distresses for small rents, it is enacted by the 57 Geo. III. c. 93. that no broker, in levying a distress under 20*l.* shall take more than the following sums under the penalty of treble the amount of the moneys so unlawfully taken: *viz.* For levying the distress, 3*s.* Man in possession, per day, 2*s.* 6*d.* Appraisement, whether by one broker or more, sixpence in the pound on the value of the goods. Stamps, the lawful amount thereof. All expences of advertisements (if any such), 10*s.* Catalogues, sale and commission, and delivery of goods, one shilling in the pound on the net produce of the sale. And the broker is required to give a copy of his charges to the person distrained upon.

It may be necessary to observe, that if a landlord enter a house, and seize upon a part of the goods as a distress in the name of all the goods of the house, that will be a good seizure of all.

2. *Replevin* is grounded upon a distress, and is a re-deliverance of it, that the thing distrained may remain with the first possessor, on security being given by him to try the right with the distrainor, and answer the same at law: and if he do not pursue his action, or it be adjudged against him, then he that took the distress shall have it again, by the writ *retorno habendo*.

By the statute of Marlbridge, the sheriff is bound, immediately upon application being made to him, to replevy goods taken in distress. And by 1 P. & M. c. 12. the sheriff shall, at his first county-day, or in two months after he has received his patent of office, appoint four deputies at least, dwelling not above twelve miles from one another, to make replevin, on pain of 5*l.* for every month that he neglects such appointment. Upon application therefore, either to the sheriff, or one of his deputies, security is to be given, that the party replevying will pursue his action against the distrainor: and that, if the right be determined against him, he will return the distress again.

Besides this, the 11 Geo. II. c. 19. requires that the officer granting a replevin on a distress for rent shall take a bond with two sureties in a sum of double the value of the goods distrained, conditioned to prosecute the suit with effect and without delay, and for return of the goods; which bond shall be assigned to the avowant, or person making cognizance, on request made to the officer; and, if forfeited, may be used in the name of the assignee. The sheriff, on receiving such security, is immediately, by his officers, to cause the chattels taken in distress to be restored into the possession of the party distrained upon; unless the distrainor

claim a property in the goods so taken. For if, by this method of distress, the distrainor happen to come again into possession of his own property in goods which before he had lost, the law allows him to keep them, without any reference to the manner by which he thus has regained possession; being a kind of personal *remitter*. If, therefore, the distrainor claim any such property, the party replevying must sue out a writ *de proprietate probando*, in which the sheriff is to try, by an inquest, in whom the property previous to the distress subsisted; and if it be found to be in the distrainor, the sheriff can proceed no farther, but must return the claim of property to the Court of King's Bench or Common Pleas, to be there farther prosecuted.

But if no claim of property be put in, or if (upon trial) the sheriff's inquest determine it against the distrainor; then the sheriff is to replevy the goods, in case they are found within his county. But if the distress be carried out of the county, or concealed, then the sheriff may return, that the goods, or beasts, are *eloigned*, carried to a distance, to places to him unknown: and thereupon the party replevying shall have a writ of *capias in withernam in vetito* (or, more properly, *repetito*) *namio*; a term which signifies a second or reciprocal distress, in lieu of the first, which was eloigned. It is therefore a command to the sheriff to take other goods of the distrainor in lieu of the distress formerly taken and eloigned, or withheld from the owner. So that there is now distress against distress; one being taken to answer the other, by way of reprisal, and as a punishment for the illegal behaviour of the original distrainor. For which reason goods taken in *withernam* cannot be replevied, till the original distress is forthcoming.

But in common cases, the goods are delivered back to the party replevying, who is then bound to bring his action of replevin; which may be prosecuted in the county court, be the distress of what value it may. But either party may remove it to the superior courts of King's Bench or Common Pleas, by writ of *recordari* or *pone*; the plaintiff at pleasure, the defendant upon reasonable cause: and also, if in the course of proceeding any right of freehold come in question, the sheriff can proceed no farther; so that it is usual to carry it up in the first instance to the courts of Westminster-hall.

Upon this action brought, and declaration delivered, the distrainor, who is now the defendant, makes *avowry*, that is, he avows taking a distress in his own right, or the right of his wife, and sets forth the reason of it, as for rent-arrear, damage done, or other cause; or else, if he justifies in another's right as his bailiff or servant, he is said to make *cognizance*, that is, he acknowledges the taking, but insists that such taking was legal, as he acted by the command of one who had a right to distrain: and on the truth and legal merits of this avowry or cognizance the cause is determined. If it be determined for the plaintiff, *viz.* that the distress was wrongfully taken, he has already got his goods back into his own possession, and shall keep them, and moreover recover damages,

But if the defendant prevail, by the default or nonsuit of the plaintiff, then he shall have a writ *de returno habendo*, whereby the goods or chattels (which were distrained, and then replevied) are returned again into his custody, to be sold or otherwise disposed of, as if no replevin had been made.

The statute of West. 2. c. 2. restrains the plaintiff, when nonsuited, from suing out any fresh replevin; but allows him a *judicial writ*, issuing out of the original record, and called a writ of *second deliverance*, in order to have the same distress again delivered to him, on giving the like security as before. And if the plaintiff be a second time nonsuit, or if the defendant have judgment upon verdict or demurrer in the first replevin, he shall have a writ of *return irreplevisable*: after which no writ of second deliverance shall be allowed. But in case of a distress for rent-arrear, the writ of second deliverance is in effect taken away by the 17 Car. II. c. 7. which directs, that if the plaintiff be nonsuit before issue joined, then upon suggestion made on the record in nature of an avowry or cognizance (or if judgment be given against him on demurrer, then without any such suggestion), the defendant may have a writ to inquire into the value of the distress by a jury, and shall recover the amount of it in damages, if less than the arrear of rent; or if more, then so much as shall be equal to such arrear, with costs; or if the nonsuit be after issue joined, or if a verdict be against the plaintiff, then the jury impanelled to try the cause shall assess such arrears for the defendant: and if (in any of these cases) the distress be insufficient to answer the arrears distrained for, the defendant may take a farther distress or distresses. But otherwise, if, pending a replevin for a former distress, a man distrain again for the same rent or service, then the party is not driven to his action of replevin, but shall have a writ of *recaption*, and recover damages for the defendant's (the re-distraitor's) contempt of the process of the law.

CHAPTER IX.

Of Detinue;—of Trover and Conversion.

WE proceed now to the consideration of other remedies which the law has supplied for the violation of the rights of property; and, first, of the action of *detinue*.

The action of *detinue* lies for the recovery of goods and chattels lent and delivered to a man to keep, or to deliver to another person, who refuses to deliver them, and detains them in his custody.

It lies also for any thing certain and valuable, wherein one may have a right of property; as, for cattle, cloth, household

goods, plate, jewels, bags of money sealed, or chests of money locked, stacks of corn, loads of wood, &c. but not for money out of a bag, or corn out of a sack, because they cannot be distinguished from another man's corn or money.

The thing detained must be once in the possession of the defendant; which is not to be altered by act of law, as seizure in execution, &c.; and the nature of the thing must continue without alteration, to entitle to this action; so that if leather be made into shoes, or timber be used in building, this action will not lie. In case of delivery of goods, if a person to whom a thing is delivered die, an action of detinue may be brought against his executors, or against any person to whom the same comes; as if things be delivered to be kept, whether by the party, or his father, ancestor, &c. he may bring this action, if detained.

If one lend me a horse, or such like thing, he must have the very thing restored, or an action of detinue lies against me; though where goods are delivered by way of loan, as if one lend another money, corn, or the like, he cannot expect the same thing again, but the same in specie and quantity. Grantees of goods, and persons to whom they are to be delivered over, &c. shall have action of detinue: and if a man bargain and sell goods, upon condition to be void on payment of money at a day, if he pay it, he may have an action of detinue for the goods.

A general action of detinue lies against any one that finds a man's goods: though if I deliver any thing to a person to re-deliver to me, and he lose it, and another find the thing, and deliver it to one who has a right to the same, no action will lie against me. But where any goods are delivered to a man, and he delivers them to another, this action will be had against the second person; and if he deliver the goods to a party having a right thereto, he is answerable.

If a person receive goods of me for my use, I may take my goods again without request; or if they be left or delivered to deliver to another man, before they are delivered I may countermand the authority, and require the goods again; and may bring an action, or take the goods where I find them.

In this action of detinue, it is necessary to ascertain the thing detained, in such a manner as that it may be specifically known and recovered. In order, therefore, to ground an action of detinue, which is only for the detaining, these points are necessary: 1. That the defendant came lawfully into possession of the goods, as either by delivery to him, or finding them; 2. That the plaintiff have a property; 3. That the goods themselves be of some value; and, 4. That they be ascertained in point of identity. Upon this the jury, if they find for the plaintiff, assess the respective values of the several parcels detained, and also damages for the detention. And the judgment is conditional, that the plaintiff recover the said goods, or (if they cannot be had) their respective values, and also the damages for detaining them.

But there is one disadvantage which attends this action; *viz.*

that the defendant is herein permitted to wage his law, that is, to exculpate himself by oath, and thereby defeat the plaintiff of his remedy; which privilege is grounded on the confidence originally reposed in the bailee by the bailor, in the borrower by the lender, and the like; from whence arose a strong presumptive evidence, that in the plaintiff's own opinion the defendant was worthy of credit. And for this reason the action itself is much disused, and has given place to the action of trover.

The action of *trover and conversion* is a special action of the case, and lies against a man who, having found goods, refuses to deliver them to the owner: or, if any one have in his possession goods delivered to him, and he uses or sells them without the owner's consent, this is a conversion for which an action of trover may be brought; also, if he do not actually convert them, but refuses to deliver them up.

An action of trover also may be brought for goods detained; for the party shall have his goods delivered, if they may be had, or damages to the value for the detaining and conversion of them. After the goods are demanded, if the person having them denies the delivery thereof, this action lies; and a denial to deliver is a conversion in law: also trespass or trover lies for the same thing; and the alleging the conversion of the goods in trespass, is to aggravate damages. If where a bond, &c. is detained, the money be received thereon, action of account lies against the receiver.

For any live goods or things inanimate, an action of trover will lie; and a plaintiff may choose to have his action of trover against the first finder of the goods, or any other who gets them afterwards. And an executor may bring an action of trover for the goods of the testator. If, either by finding or delivery of goods, the defendant have a lawful possession, there must be a demand and refusal to make the conversion; but if the possession were tortuous, as if the defendant take away my hat, &c. the very taking is a sufficient proof of a conversion, without any thing farther.

This action also lies for goods, although they come into the possession of the plaintiff before the action brought, which doth not satisfy for the detainer, or purge the wrong. In case a person take the horse of another, and ride him, and then deliver the same to the party, he may, notwithstanding, have his action, it being a conversion, and re-delivery is no bar. But where a defendant generally tenders the goods, if the plaintiff refuse to receive them, that will go in mitigation of damages.

If a man find goods, he ought not to abuse or use them; for therein lies the offence to found this action, the point of which is the conversion. In this case, the party finding is to deliver them on demand, &c. though he may answer, that he knows not whether the plaintiff is the true owner. But where goods lost are found in the hands of another, if he bought them in open fair or market, this alters the property, and the plaintiff cannot recover them from him.

In action of trover, if a conversion cannot be proved, then proof is to be had of a demand made of the thing before the action brought, and that it was not delivered; and the property of the plaintiff must be proved, before the goods came to the defendant's hands.

The fact of the finding, or trover, is immaterial: for the plaintiff needs only to suggest (as words of form) that he lost such goods, and that the defendant found them; and if he prove that the goods are his property, and that the defendant had them in his possession, it is sufficient. But a conversion must be fully proved; and then in this action the plaintiff shall recover damages equal to the value of the thing converted, but not the thing itself; which nothing will recover but an action of detinue or replevin.

CHAPTER X.

Of Debts, Covenants, and Promises.

WE shall now consider the injuries and their remedies, which happen against those rights of property that are founded upon and arise from contracts, either express or implied. These include three distinct species; debts, covenants, and promises.

The legal acceptance of *debt* is, a sum of money due by certain and express agreement; as, by a bond for a determinate sum; a bill, or note; a special bargain; or a rent reserved on a lease; where the quantity is fixed and specific, and does not depend upon any subsequent valuation to settle it. The nonpayment of these is an injury, for which the proper remedy is by action of debt to compel the performance of the contract, and recover the specific sum due. So also, if I verbally agree to pay a man a certain price for a certain parcel of goods, and fail in the performance, an action of debt lies against me; for this is also a determinate contract: but if I agree for no settled price, I am not liable to an action of debt, but a special action on the case, according to the nature of my contract. And, indeed, actions of debt are now seldom brought but upon special contracts under seal, wherein the sum due is clearly and precisely expressed: for, in case of such an action upon a simple contract, the plaintiff labours under two difficulties. First, the defendant has here the same advantage as in an action of detinue, that of waging his law, or purging himself of the debt by oath, if he think proper. Secondly, in an action of debt the plaintiff must prove the whole debt he claims, or recover nothing at all. For the debt is one single cause of action, fixed and determined; and which, therefore, if the proof vary

from the claim, cannot be looked upon as the same contract whereof the performance is sued for. If, therefore, I bring an action of debt for 30*l*. I am not at liberty to prove a debt of 20*l*. and recover a verdict thereon; any more than if I bring an action of detinue for a horse, I can thereby recover an ox: for I fail in the proof of that contract, which my action or complaint has alleged to be specific, express, and determinate.*

But in an action on the case, or what is called an *indebitatus assumpsit*, which is not brought to compel a specific performance of the contract, but to recover damages for its non-performance, the implied *assumpsit*, and consequently the damages for the breach of it, are in their nature indeterminate, and will therefore adapt and proportion themselves to the truth of the case which shall be proved, without being confined to the precise demand stated in the declaration. For if any debt be proved, however less than the sum demanded, the law will raise a promise *pro tanto*, and the damages will of course be proportioned to the actual debt. So that I may declare that the defendant, being indebted to me in 30*l*. undertook or promised to pay it, but failed; and lay my damages arising from such failure at what sum I please: and the jury will, according to the nature of my proof, allow either the whole in damages, or any inferior sum. And even in actions of debt where the contract is proved or admitted, if the defendant can shew that he has discharged any part of it, the plaintiff shall recover the residue.

2. A *covenant* also, contained in a deed, to do a direct act, or to omit one, is another species of express contracts, the breach of which is a civil injury. As if a man covenant to be at York by such a day, or not to exercise a trade in a particular place, and is not at York at the time appointed, or carries on his trade in the place forbidden, these are direct breaches of his covenant. The remedy for this is by a writ of covenant; which directs the sheriff to command the defendant, generally, to keep his covenant with the plaintiff (without specifying the nature of the covenant), or shew good cause to the contrary: and if he continue refractory, or the covenant is already so broken that it cannot now be specifically performed, then the subsequent proceedings set forth with precision the covenant, the breach, and the loss which has happened thereby; whereupon the jury will give damages in proportion to the injury sustained by the plaintiff.

A covenant must be to do what is lawful and possible, or it will not be binding; and in such case, where there is any agreement under hand and seal, action of covenant may be brought on it: and if one is party to a deed, his agreement to pay amounts to a covenant.

Upon a bond action of covenant lies, it proving an agreement; and if a person covenant to pay another a certain sum of money

* But it is now determined, that in an action of debt upon a simple contract, the plaintiff may recover a less sum than is stated in his writ or declaration. 1 Hen. Bl. 249; 2 Bl. Rep. 1221.

at a day, though he may bring action of debt for it, yet may writ of covenant be had at his election; but when only a hand is to a writing, and not a seal, this action will not lie, but an action of the case upon breach of the agreement.

If a man covenant with one to pay him money for time to come, and the covenantee die before the day, his executors or administrators shall have an action of covenant for the money, and recover the same: also, in every case where a testator is bound by a covenant, the executor shall be liable, if it be not determined by the testator's death. Not only parties to deeds, but their executors and administrators, may take advantage of covenants: but there may be an agreement and covenant only to be performed by the parties themselves.

In deeds and articles of covenants sometimes a clause for performance, with a penalty, is inserted; and at other times, and more frequently, bonds are given for the performance, with a sufficient penalty, separate from the deed; which last being sued, the jury must find the penalty; but on covenant, the damages only. And commonly the party damaged in this action can recover nothing but damages for the breach; except in real actions.

Where it is agreed that one man shall pay 100*l.* to another for lands in such a place, this is a mutual real covenant, and action of covenant lies, if the other party refuse to convey, &c. And when covenants are distinct and mutual, several actions may be brought against the parties: but if there be mutual covenants, and the one not to be performed before a covenant precedent, there the covenant is not suable till the other is performed.

If a person covenant expressly to repair a house, and it be burnt down by lightning or any other accident; yet he ought to repair it, or action of covenant lies against him: for it was in his power to have guarded against it in his contract by exception, &c. though a tenant is not so bound by covenant in law. But where the use of a thing is demised, and it runs to decay, so that the lessee or tenant cannot have the benefit of it; for this no action of covenant lies for the lessee; and if the lease, &c. be not good, there can be no covenant, nor any breach.

If a man make a lease of lands for years, and then turn out the lessee, he shall have covenant against the lessor, though there be no express covenant in the deed: but in case a stranger enter before such lessee, the lessee shall not have an action of covenant upon this ouster, because he was never a lessee in privity to have the action: yet a stranger to the deed may not take advantage of a covenant.

A covenant for the lessee to enjoy against all men extends not to tortuous acts and entries, &c. for which the lessee hath his proper remedy against the aggressors. If a person covenant in a deed, that he hath a good right to grant, &c. and he have no right, it is a breach of covenant for which action of covenant lies: and where a man by his own act disables himself to perform a cove-

nant, it is a breach thereof: and no duty or cause of action arises upon any covenant, till it be broken.

On covenants in general, if the plaintiff have judgment in an action for one breach, and afterwards the covenantor break his covenant again, a new action may be brought; and so for every breach; or in covenants perpetual, upon a new breach, a *scire facias* may be had on the former judgment, and the plaintiff need not bring any new writ of covenant.

3. A *promise* may be considered as a verbal covenant, and wants nothing but the solemnity of writing and sealing to make it absolutely the same. If, therefore, it be to do any explicit act, it is an express contract, as much as any covenant; and the breach of it is an equal injury. The remedy indeed is not exactly the same; since, instead of an action of covenant, there only lies an action upon the case, for what is called the *assumpsit*, or undertaking of the defendant, the failure of performing which is the wrong or injury done to the plaintiff, the damages whereof a jury are to estimate and settle. As, if a builder promise, undertake, or assume to build and cover a house within a time limited, and fail to do it; an action on the case will lie against the builder for this breach of his express promise, undertaking, or *assumpsit*. So also in the case before-mentioned, of a debt by simple contract, if the debtor promise to pay it, and do not, this breach of promise entitles the creditor to his action on the case, instead of being driven to an action of debt. Thus likewise a promissory note, or note of hand not under seal, to pay money at a day certain, is an express *assumpsit*; and the payee at common law, and by custom and act of parliament the indorsee, may recover the value of the note in damages, if it remain unpaid.

Some agreements indeed, though never so expressly made, are deemed of so important a nature, that they ought not to rest on verbal promise only, which cannot be proved but by the memory (which sometimes will induce the perjury) of witnesses. To prevent which, the Statute of Frauds and Perjuries (29 Car. II. c. 3.) enacts, that in the five following cases no verbal promises shall be sufficient to ground an action upon, but at the least some note or memorandum of it shall be made in writing, and signed by the party to be charged therewith: 1. Where an executor or administrator promises to answer damages out of his own estate. 2. Where a man undertakes to answer for the debt, default, or miscarriage of another. 3. Where any agreement is made upon consideration of marriage. 4. Where any contract or sale is made of lands, tenements, hereditaments, or any interest therein. 5. And, lastly, where there is any agreement, that is not to be performed within a year from the making thereof. In all these cases a mere verbal *assumpsit* is void.

These provisions in the statute have produced many decisions, both in the courts of law and equity.

It is determined, that if two persons go to a shop, and one orders

goods, and the other says, "If he do not pay, I will; or, I will see you paid;" he is not bound, unless his engagement is reduced into writing. In all such cases the question is, Who is the buyer, or to whom is the credit given? and who is the surety? and that question, from all the circumstances, must be ascertained by the jury; for if the person for whose use the goods are furnished be liable at all, any promise by a third person to discharge the debt must be in writing, otherwise it is void; and, in ascertaining the fact, whether the party promising intended only to come in aid of the liability of the person on whose account he promised, or to become himself immediately responsible, the court will not only pay attention to the expression used, but to the particular situation, circumstances, and general responsibility of the party promising.

The principal point in cases of this kind is, whether, or not, the party who is to be benefited by the promise is liable at all. If there is no liability, there is nothing to which the promise can be collateral, or in relation to which it can be regarded as an undertaking to answer for the debt, default, or miscarriage of another person. It must therefore, without such liability in a third person, be an original undertaking in the party promising, and will subject him to the payment; the case being out of the Statute of Frauds altogether, and of course no written evidence of the promise is necessary.

The distinction between the collateral and the original promise is exemplified by Lord Chief Justice Holt, in the case of *Watkin v. Perkins*. If, says his lordship, A promise B, being a surgeon, that if he will cure D of a wound, he will see him paid; this is only a promise to pay if D do not, and therefore it ought to be in writing, to be within the Statute of Frauds. But if A promise in such a case, that he will be B's paymaster, whatever he shall deserve, it is immediately the debt of A, and he is liable without writing. In the case first put, it is clear that B will have a double remedy; in the second, the credit would be considered wholly given to the express promiser. And even if by subsequent circumstances D should render himself liable, such liability, not having existed or come into existence at the time of the promise, would not have any effect in varying the predicament of the first promiser; whose promise would still be good without writing. Again, if A promise B, that in consideration of his doing a particular act, C would pay him such a sum, or that if C do not pay him such sum, he (A) will pay the same, that is no collateral promise, unless C is privy to the contract, and recognized himself as debtor also; but otherwise A is the sole debtor, and the statute is out of the case.

Mutual promises to marry need not be in writing, for the statute relates only to agreements made in consideration of the marriage.

A lease not exceeding three years from the making thereof, and in which the rent reserved amounts to two-thirds of the improved value, is good without writing; but all other parole leases or

agreements for any interest in lands have the effect of estates at will only.

All declarations of trust, except such as result by implication of law, must be made in writing.

If a promise depend upon a contingency, which may or may not fall within a year, it is not within the statute: as, a promise to pay a sum of money upon a death or marriage, or upon the return of a ship, or to leave a legacy, by will, is good by parole; for such a promise may by possibility be performed within the year. But even a written undertaking, to pay the debt of another is void, unless a good consideration appear in the writing; and the consideration (if any) cannot be proved by parole evidence.

If a growing crop be purchased without writing, the agreement before part execution may be put an end to by parole notice.

In the first and third sections of the Statute of Frauds, the contracts must be signed by the party, or his agent authorized *by writing*; but the agreements specified in the fourth section must be signed by the party, or some one by him lawfully authorized; and the words *by writing* are there omitted. And Lord Redesdale has said upon this, that at all times (as well before the act as since) it was necessary to have an authority in writing for creating or passing any estate in land for another; it was otherwise as to contracts which passed no estate. Therefore an agent authorized by parole may make such a written agreement for his principal, as will be sufficient for a court of equity to decree a specific performance of.

A court of equity will decree a specific performance of a verbal contract, when it is confessed by a defendant in his answer, or when there has been a part performance of it, as by payment of part of the consideration money, or by entering and expending money upon the estate; for such acts preclude the party from denying the existence of the contract, and prove that there can be no fraud or perjury in obtaining the execution of it. But Lord Eldon seems to think, that a specific performance cannot be decreed, if the defendant in his answer admit a parole agreement, and at the same time insist upon the benefit of the statute.

If one party only sign an agreement, he is bound by it; and if an agreement be by parole, but it is agreed it shall be reduced into writing, and this is prevented by the fraud of one of the parties, performance of it will be decreed.

CHAPTER XI.

Of Assumpsit.

AN *assumpsit* is an implied contract, by which one man is bound to do justice to another, upon the principle of natural reason and the just construction of law. Thus—

1. If I employ a person to transact any business, or perform any work for me, the law implies that I undertook or assumed to pay him so much as his labour deserved. And if I neglect to make him amends, he has a remedy for this injury by bringing his action on the case, upon this implied *assumpsit*; wherein he is at liberty to suggest that I promised to pay him so much as he reasonably deserved, and then to aver that his trouble was really worth such a particular sum, which the defendant has omitted to pay. This is called an *assumpsit* on a *quantum meruit*.

2. There is also an implied *assumpsit* on a *quantum valebat*, which is very similar to the former, being only where one takes up goods or wares of a tradesman, without expressly agreeing for the price. There the law concludes, that both parties did intentionally agree that the real value of the goods should be paid; and an action on the case may be brought accordingly, if the vendee refuse to pay that value.

3. A third species of implied *assumpsits* is, when one has had and received money belonging to another without any valuable consideration given on the receiver's part; for the law construes this to be money had and received for the use of the owner only, and implies that the person so receiving promised and undertook to account for it to the owner. And if he unjustly detain it, an action on the case lies against him, for which he will recover damages. This is a very extensive and beneficial remedy, applicable to almost every case where the defendant has received money which *ex æquo et bono* he ought to refund. It lies for money paid by mistake, or on a consideration which happens to fail, or through imposition, extortion, or oppression, or where any undue advantage is taken of the plaintiff's situation.

4. Where a person has laid out and expended his own money for the use of another at his request, the law implies a promise of repayment, and an action will lie on this *assumpsit*.

If a surety in a bond pay the debt of a principal, he may recover it back from the principal in an action of *assumpsit*, for so much money paid in advance to his use. Yet in ancient times this action could not be maintained: and it is said, that the first case of the kind, in which the plaintiff succeeded, was tried before Mr. Justice Gould, at Dorchester. But this is perfectly consistent with the equitable principles of an *assumpsit*.

5. Likewise, fifthly, upon a stated account between two merchants or other persons, the law implies that he against whom the balance appears has engaged to pay it to the other, though there be not any actual promise. And from this implication it is frequent for actions on the case to be brought, declaring that the plaintiff and defendant had settled their accounts together, *insimul computassent* (which gives name to this species of *assumpsit*), and that the defendant engaged to pay the plaintiff the balance, but has since neglected to do it. But if no account have been made up, then the legal remedy is by bringing a writ of account, *de computo*; commanding the defendant to render a just account to the plaintiff, or shew the court good cause to the contrary. In this action, if the plaintiff succeed, there are two judgments: the first is, that the defendant do account (*quod computet*) before auditors appointed by the court; and when such account is finished, then the second judgment is, that he do pay the plaintiff so much as he is found in arrear. This action, by the old common law, lay only against the parties themselves, and not their executors; because matters of account rested solely in their own knowledge. But this defect, after many fruitless attempts in parliament, was at last remedied by the 4 Ann. c. 16. which gives an action of account against the executors and administrators. But, however, it is found by experience, that the most ready and effectual way to settle these matters of account is by bill in a court of equity, where a discovery may be had on the defendant's oath, without relying merely on the evidence which the plaintiff may be able to produce. Wherefore actions of account, to compel a man to bring in and settle his accounts, are now very seldom used; though, when an account is once stated, nothing is more common than an action upon the implied *assumpsit* to pay the balance.

6. The last class of contracts implied by reason and just construction of law arises upon this supposition, that every one who undertakes any office, employment, trust, or duty, contracts with those who employ or entrust him to perform it with integrity, diligence, and skill. And if, by his want of either of those qualities, any injury accrue to individuals, they have therefore their remedy and damages by a special action on the case. A few instances will fully illustrate this matter:—

If an officer of the public be guilty of neglect of duty, or a palpable breach of it, of nonfeasance, or of misfeasance; as, if the sheriff do not execute a writ sent to him, or if he wilfully make a false return thereto; in both these cases the party aggrieved shall have an action on the case.

If a sheriff or gaoler suffer a prisoner who is taken upon mesne process (that is, during the pendency of a suit) to escape, he is liable to an action on the case. But if, after judgment, a gaoler or a sheriff permit a debtor to escape who is charged in execution for a certain sum, the debt immediately becomes his own, and he is compellable by action of debt, being for a sum liquidated and ascertained, to satisfy the creditor his whole demand; which

doctrine is grounded on the equity of the statute of Westm. 2. 13 Edw. I. c. 11. and 1 Ric. II. c. 12.

An advocate or attorney who betrays the cause of his client, or being retained neglects to appear at the trial, by which the cause miscarries, is liable to an action on the case, for a reparation to his injured client.*

There is also in law always an implied contract, with a common innkeeper, to secure his guest's goods in his inn; with a common carrier, or bargemaster, to be answerable for the goods he carries; with a common farrier, that he shoes a horse well, without laming him; with a common tailor, or other workman, that he performs his business in a workmanlike manner; in which if they fail, an action on the case lies to recover damages for such breach of their general undertaking.

But if I employ a person to transact any of these concerns, whose common profession or business it is not, the law implies no such *general* undertaking; but, in order to charge him with damages, a *special* agreement is required. Also, if an innkeeper or other victualler hang out a sign, and open his house for travellers, it is an implied engagement to entertain all persons who travel that way; and upon this universal *assumpsit* an action on the case will lie against him for damages, if he without good reason refuse to admit a traveller.

If any one cheat me with false cards or dice, or by false weights and measures, or by selling me one commodity for another, an action on the case also lies against him for damages, upon the contract which the law always implies, that every transaction is fair and honest.

In contracts likewise for sales, it is constantly understood that the seller undertakes that the commodity he sells is his own; and if it prove otherwise, an action on the case lies against him, to exact damages for this deceit. In contracts for provisions, it is always implied that they are wholesome; and if they be not, the same remedy may be had. Also, if he that sells any thing do upon the sale warrant it to be good, the law annexes a tacit contract to his warranty, that if it be not so, he shall make compensation to the buyer; else it is an injury to good faith, for which an action on the case will lie to recover damages. The warranty must be *upon the sale*; for if it be made *after*, and not *at* the time of the sale, it is a void warranty, for it is then made without any consideration; neither does the buyer then take the goods upon the credit of the vendor. Also, the warranty can only reach to things in being at the time of the warranty made, and not to things *in futuro*: as, that a horse is sound at the time of buying him, not that he *will be* sound two years hence.

* It has been decided at *Nisi Prius*, that no action can be maintained against an advocate for ignorance, misconduct, or for neglecting to appear at the trial, by which the cause has miscarried. The client must rely only upon his advocate's honour. *Peake, N.P. 96, 122.* But, in such cases, if complaint be made to the court in which the advocate practises, it can censure him, order him to pay the costs, or perhaps disbar him.

But if the vendor knew the goods to be unsound, and have used any art to disguise them, or if they be in any shape different from what he represents them to be to the buyer, this artifice shall be equivalent to an express warranty, and the vendor is answerable for their goodness.

A general warranty will not extend to guard against defects that are plainly and obviously the object of one's senses; as, if a horse be warranted perfect, and wants either a tail or an ear; unless the buyer in this case be blind. But if cloth be warranted to be of such a length, when it is not, there an action on the case lies for damages; for that cannot be discerned by sight, but only by a collateral proof, the measuring it. Also, if a horse be warranted sound, and he wants the sight of an eye, though this seems to be the object of one's senses, yet as the discernment of such defects is frequently matter of skill, it hath been held that an action on the case lies to recover damages for this imposition.

Besides the special action on the case, there is also a peculiar remedy, entitled an action of *deceit*, to give damages in some particular cases of fraud, and principally where one man does any thing in the name of another by which he is deceived or injured; as, if one bring an action in another's name, and then suffer a nonsuit, whereby the plaintiff becomes liable to costs; or where one obtains or suffers a fraudulent recovery of lands, tenements, or chattels, to the prejudice of him that hath right. As, when by collusion the attorney of the tenant makes default in a real action, or where the sheriff returns that the tenant was summoned, when he was not so, and in either case he loses the land, the writ of deceit lies against the demandant, and also the attorney, or the sheriff and officers, to annul the former proceedings, and recover back the land. It also lies in the cases of warranty before mentioned, and other personal injuries committed contrary to good faith and honesty. But an action on the case for damages, in nature of a writ of deceit, is more usually brought upon these occasions: and, indeed, it is the only remedy for a lord of a manor, in or out of ancient demesne, to reserve a fine or recovery had in the king's courts of lands lying within his jurisdiction; which would otherwise be thereby turned into frank fee. And this may be brought by the lord against the parties and *cestuy qui use* of such fine or recovery; and thereby he shall obtain judgment, not only for damages (which are usually remitted), but also to recover his court and jurisdiction over the lands, and to annul the former proceedings.

CHAPTER XII.

Of Ouster.

WE now come to consider the injuries committed against that species of property denominated *real*. These injuries are of six sorts: *viz.* 1. Ouster; 2. Trespass; 3. Nuisance; 4. Waste; 5. Subtraction; 6. Disturbance.

OUSTER, or dispossession, is a wrong or injury that carries with it the amotion of possession: for thereby the wrong-doer gets into the actual occupation of the land or hereditament, and obliges him that hath a right to seek his legal remedy, in order to gain possession, and damages for the injury sustained. And such ouster, or dispossession, may either be of the *freehold* or of *chattels real*.

Ouster of the freehold is effected by one of the following methods: 1. Abatement; 2. Intrusion; 3. Disseisin; 4. Discontinuance; 5. Forfeiture.

1. An *abatement* is where a man dies seized of an inheritance, and, before the heir or devisee enters, a stranger who has no right makes entry, and gets possession of the freehold, this entry of him is called an abatement, and he himself is denominated an abator.

2. The second species of injury by ouster, or amotion of possession from the freehold, is by *intrusion*; which is the entry of a stranger, after a particular estate of freehold is determined, before him in remainder or reversion; and it happens where a tenant for a term of life dies, seized of certain lands and tenements, and a stranger enters thereon, after such death of the tenant, and before any entry of him in remainder or reversion. This entry and interposition of the stranger differs from an abatement in this—that an abatement is always to the prejudice of the heir, or immediate devisee; an intrusion is always to the prejudice of him in remainder or reversion. For example; if A die seized of lands in fee-simple, and, before the entry of B his heir, C enter thereon, this is an abatement; but if A be tenant for life, with remainder to B in fee-simple, and, after the death of A, C enters, this is an intrusion. Also, if A be tenant for life in lease from B, or his ancestors, or be tenant by the courtesy, or in dower, the reversion being vested in B; and, after the death of A, C enters, and keeps B out of possession; this is likewise an intrusion. So that an intrusion is always immediately consequent upon the determination of a particular estate; an abatement is always consequent upon the descent or devise of an estate in fee-simple. And in either case the injury is equally great to him whose possession is defeated by this unlawful occupancy.

3. The third species of injury by ouster, or privation of the freehold, is by *disseisin*. Disseisin is a wrong putting out of him that is seised of the freehold. It may be effected either in corporeal inheritances, or in incorporeal. Disseisin of things corporeal, as of houses, lands, &c. must be by entry and actual dispossession of the freehold: as, if a man enter either by force or fraud into the house of another, and turn, or at least keep him or his servants out of possession. Disseisin of incorporeal hereditaments cannot be an actual dispossession; for the subject itself is neither capable of actual bodily possession, nor dispossession; but it depends on their respective natures, and various kinds; being in general nothing more than a disturbance of the owner in the means of coming at or enjoying them.

These three species of injury, abatement, intrusion, and disseisin, are such wherein the entry of the tenant *ab initio*, as well as the continuance of his possession afterwards, is unlawful. But the two remaining species are where the entry of the tenant was at first lawful, but the wrong consists in the detaining of possession afterwards.

4. Such is the injury of *discontinuance*; which happens when he who hath an estate-tail, makes a larger estate of the lands than by law he is entitled to do; in which case the estate is good so far as his power extends who made it, but no farther. As if tenant in tail make a feoffment in fee-simple, or for the life of the feoffee or in tail; all which are beyond his power to make, for that by the common law extends no farther than to make a lease for his own life: in such case the entrance of the feoffee is lawful during the life of the feoffor; but if he retain the possession after the death of the feoffor, it is an injury, which is termed a discontinuance; the ancient legal estate, which ought to have survived to the heir in tail, being gone, or at least suspended, and for a while discontinued.

5. The fifth and last species of injuries by ouster and privation of the freehold, where the entry of the present tenant or possessor was originally lawful, but his detainer is now become unlawful, is that by *deforcement*. This, in its most extensive sense, is *nomen generalissimum*, a much larger and more comprehensive expression than any of the former; signifying the holding of any lands or tenements to which another person hath a right. So that this includes as well an abatement, an intrusion, a disseisin, or a discontinuance, as any other species of wrong whatsoever, whereby he that hath right to the freehold is kept out of possession. But, as contradistinguished from the former, it is only such a detainer of the freehold from him that hath the right of property, but never had any possession under that right, as falls within none of the injuries which we have before explained. As in case where a lord has a seignory, and lands escheat to him *propter defectum sanguinis*, but the seisin of the lands is withheld from him: here the injury is not *abatement*, for the right vests not in the lord as heir or devisee; nor is it *intrusion*, for it vests not in him who

hath the remainder or reversion ; nor is it a *disseisin*, for the lord was never seised ; nor does it at all bear the nature of any species of *discontinuance* ; but, being neither of these four, it is therefore a *deforcement*.

If a man marry a woman, and during the coverture is seised of lands, and aliene, and die ; is disseised and die ; or die in possession ; and the alienee, disseisor, or heir, enter on the tenements, and do not assign the widow her dower ; this is also a deforcement to the widow, by withholding lands to which she hath a right.

In like manner, if a man lease lands to another for a term of years, or for the life of a third person, and the term expire by surrender, efflux of time, or death of the *cestuy qui vie* ; and the lessee, or any stranger, who was at the expiration of the term in possession, hold over, and refuse to deliver the possession to him in remainder or reversion ; this is also a deforcement.

Deforcements may also arise upon a breach of a condition in law : as, if a woman give lands to a man by deed, to the intent that he marry her, and he will not, when thereunto required, but continues to hold the lands ; this is such a fraud on the man's part, that the law will not allow it to divest the woman's right of possession, though, his entry being lawful, it does divest the actual possession, and thereby becomes a deforcement.

Deforcements may also be grounded on the disability of the party deforced : as, if an infant make an alienation of his lands, and the alienee enter and keep possession ; now, as the alienation is voidable, this possession as against the infant (or, in case of his decease, as against his heir) is after avoidance wrongful, and therefore a deforcement. The same happens, when one of non-sane memory alienes his lands or tenements, and the alienee enters and holds possession ; this also may be a deforcement.

Another species of deforcement is, where two persons have the same title to land, and one of them enters and keeps possession against the other : as, where the ancestor dies seised of an estate in fee-simple, which descends to two sisters as coparceners, and one of them enters before the other, and will not suffer her sister to enter and enjoy her moiety ; this is also a deforcement.

Deforcement may also be grounded on the non-performance of a covenant, real : as, if a man seised of lands covenant to convey them to another, and neglect or refuse so to do, but continues possession against him ; this possession, being wrongful, is a deforcement : whence, in levying a fine of lands, the persons against whom the fictitious action is brought, upon a supposed breach of covenant, is called the *deforciant*. And, lastly, by way of analogy, keeping a man by any means out of a freehold office is construed to be a deforcement ; though, being an incorporeal hereditament, the deforciant has no corporeal possession. So that whatever injury, in withholding the possession of a freehold, is not included under one of the four former heads, is comprised under this of deforcement.

The several species and degrees of injury by ouster being thus defined, the next consideration is the remedy; which is, universally, the *restitution or delivery of possession* to the right owner, and, in some cases, *damages* also for the unjust amotion. The methods whereby these remedies, or either of them, may be obtained are various:—

1. The first is the extra-judicial and summary one of *entry* by the legal owner, when another person, who hath no right, hath previously taken possession of lands and tenements. In this case the party entitled may make a formal, but peaceable entry thereon, declaring that thereby he takes possession; or he may enter on any part of it in the same county, declaring it to be in the name of the whole: but if it lie in different counties, he must make different entries. Also, if there be *two* disseisors, the party disseised must make his entry on *both*; or if *one* disseisor have conveyed the lands with livery to *two* distinct feoffees, entry must be made on *both*: for as their seisin is distinct, so also must be the act which divests that seisin.

If the claimant be deterred from entering by menaces or bodily fear, he may make *claim*, as near to the estate as he can, with the like forms and solemnities; which claim is in force for only a year and a day. And this claim, if it be repeated once in the space of every year and day (which is called *continual claim*), has the same effect with, and in all respects amounts to, a legal entry.

This remedy by entry takes place in three only of the five species of ouster, *viz.* abatement, intrusion, and disseisin: for, as in these the original entry of the wrong-doer was unlawful, they may therefore be remedied by the mere entry of him who hath right. But upon a discontinuance or deforcement, the owner of the estate cannot enter, but is driven to his action: for herein the original entry being lawful, and thereby an apparent right of possession being gained, the law will not suffer that right to be overthrown by the mere act or entry of the claimant. Yet a man may enter on his tenant by sufferance: for such tenant hath no freehold, but only a bare possession; which may be defeated, like a tenancy at will, by the mere entry of the owner. But if the owner think it more expedient to suppose or admit such tenant to have gained a tortuous freehold, he is then remediable by writ of entry.

On the other hand, in case of abatement, intrusion, or disseisin, where entries are generally lawful, this right of entry may be *toll'd*, that is, taken away by descent. Descents, which take away entries, are when any one, seised by any means whatsoever of the inheritance of a corporeal hereditament, dies, whereby the same descends to his heir: in this case, however feeble the right of the ancestor might be, the entry of any other person who claims title to the freehold is taken away; and he cannot recover possession against the heir by this summary method, but is driven to his action to gain a legal seisin of the estate.

So that in general it appears, that no man can recover possession by mere entry on lands which another hath by descent. Yet this rule hath some exceptions, wherein those reasons cease upon which the general doctrine is grounded, especially if the claimant were under any legal disabilities during the life of the ancestor, either of infancy, coverture, imprisonment, insanity, or being out of the realm; in all which cases there is no neglect or *laches* in the claimant, and therefore no descent will bar or take away his entry. And this title of taking away entries by descent is still farther narrowed by the 32 Hen. VIII. c. 22. which enacts, that if any person disseise or turn another out of possession, no descent to the heir of the disseisor shall take away the entry of him that hath a right to the land, unless the disseisor had peaceable possession five years next after the disseisin. But the statute extends not to any feoffee or donee of the disseisor, mediate or immediate. On the other hand, it is enacted by the Statute of Limitations, (21 Jac. I. c. 16.) that no entry shall be made by any man upon lands, unless within twenty years after his right shall accrue. And by the 4 & 5 Ann. c. 16. no entry shall be of force to satisfy the said Statute of Limitations, or to avoid a fine levied of lands, unless an action be thereupon commenced within one year after, and prosecuted with effect.

2. Thus far of remedies, where the tenant or occupier of the land hath gained only a *mere possession*, and no apparent shadow of right. Next follow another class, which are in use where the title of the tenant or occupier is advanced one step nearer to perfection, so that he hath in him not only a bare possession, which may be destroyed by a bare entry, but also an *apparent right* of possession, which cannot be removed but by orderly course of law; in the process of which it must be shewn, that although he hath at present possession, and therefore hath the presumptive right, yet there is a right of possession superior to his, residing in him who brings the action.

These remedies are either by a *writ of entry* or an *assize*, which are actions merely *possessory*; serving only to regain that possession, whereof the demandant (that is, he who sues for the land) or his ancestors have been unjustly deprived by the tenant or possessor of the freehold, or those under whom he claims. They decide nothing with respect to the *right of property*; only restoring the demandant to that state or situation in which he was (or by law ought to have been) before the dispossession committed. But this without any prejudice to the right of ownership; for if the dispossessor have any legal claim, he may afterwards exert it, notwithstanding a recovery against him in these possessory actions. Only the law will not suffer him to be his own judge, and either take or maintain possession of the lands, until he hath recovered them by legal means; rather presuming the right to have accompanied the ancient seisin, than to reside in one who has no such evidence in his favour.

CHAPTER XIII.

Of Ejectment.

HAVING considered the several species of injury by dispossession or ouster of the freehold, we now come to that of dispossession of chattels real, that is, by amoving the possession of the tenant from an estate by statute merchant, statute staple, recognizance in the nature of it, or *elegit*, or from an estate for years.

I. *Ouster*, or amotion of possession *from estates held by statute, recognizance, or elegit*, is only liable to happen by a species of disseisin, or turning out of the legal proprietor before his estate is determined, by raising the sum for which it is given him in pledge. And for such ouster, though the estate be merely a chattel interest, the owner shall have the same remedy as for an injury to a freehold, *viz.* by assize of *novel disseisin*.

II. As for *ouster*, or amotion of possession *from an estate for years*; this happens only by a like kind of disseisin, ejectment, or turning out of the tenant from the occupation of the land during the continuance of his term. For this injury the law has provided him with two remedies, according to the circumstances and situation of the wrong-doer: the writ of *ejectione firmæ*, which lies against any one, the lessor, reversioner, remainder-man, or any stranger, who is himself the wrong-doer, and has committed the injury complained of; and the writ of *quare ejecit infra terminum*, which lies not against the wrong-doer or ejector himself, but his feoffee, or other person claiming under him. These are mixed actions, somewhat between real and personal; for therein are two things recovered, as well restitution of the term of years, as damages for the ouster or wrong.

1. A writ of *ejectione firmæ*, or action of trespass in *ejectment*, lies where lands or tenements are let for a term of years, and afterwards the lessor, reversioner, remainder-man, or any stranger, ejects or ousts the lessee of his term. In this case he shall have his writ of *ejection*, to call the defendant to answer for entering on the lands so demised to the plaintiff for a term that is not yet expired, and ejecting him. And by this writ the plaintiff shall recover back his term, or the remainder of it, with damages.

The better to apprehend whereby this end is effected, we must recollect that the remedy by ejectment is in its original an action brought by one who hath a lease for years, to repair the injury done him by dispossession. In order, therefore, to convert it into a method of trying titles to the freehold, it is first necessary that the claimant take possession of the lands to empower him to constitute a lease for years, that he may be capable of receiving this injury of dispossession. When therefore a person who hath right of

entry into lands, determines to acquire that possession which is wrongfully withheld by the present tenant, he makes (as by law he may) a formal entry on the premises; and, being so in the possession of the soil, he there, upon the land, seals and delivers a lease for years to some third person, or lessee; and, having thus given him entry, leaves him in possession of the premises. This lessee is to stay upon the land, till the prior tenant, or he who had the previous possession, enters thereon afresh, and ousts him; or till some other person (either by accident or by agreement beforehand) comes upon the land, and turns him out or ejects him. For this injury the lessee is entitled to his action of ejectment against the tenant, or this *casual ejector*, whichever it was that ousted him, to recover back his term and damages. But where this action is brought against such a casual ejector as is before mentioned, and not against the very tenant in possession, the court will not suffer the tenant to lose his possession without an opportunity to defend it. Wherefore it is a standing rule, that no plaintiff shall proceed in ejectment to recover lands against a casual ejector, without notice given to the tenant in possession (if any there be), and making him a defendant if he pleases. And in order to maintain the action, the plaintiff must, in case of any defence, make out four points before the court; viz. *title, lease, entry, and ouster*. First, he must shew a good *title* in his lessor, which brings the matter of right entirely before the court; then, that the lessor, being seised or possessed by virtue of such title, did make him the *lease* for the present term; thirdly, that he, the lessee, or plaintiff, did *enter*, or take possession, in consequence of such lease; and then, lastly, that the defendant *ousted* or ejected him. Whereupon he shall have judgment to recover his term and damages; and shall, in consequence, have a *writ of possession*, which the sheriff is to execute by delivering him the undisturbed and peaceable possession of his term.

This was the regular method of bringing an action of ejectment, in which the title of the lessor comes collaterally and incidentally before the court, in order to shew the injury done to the lessee by this ouster. This method must still be continued in due form and strictness, save only as to the notice to the tenant, whenever the possession is vacant, or there is no actual occupant of the premises; and also in some other cases. But as much trouble and formality were found to attend the actual making of the *lease, entry, and ouster*, a new and more easy method of trying titles by writ of ejectment is now practised. This entirely depends upon a string of legal fictions: no actual lease is made, no actual entry by the plaintiff, no actual ouster by the defendant; but all are merely ideal, for the sole purpose of trying the title. To this end, in the proceedings, a lease for a term of years is stated to have been made by him who claims title to the plaintiff who brings the action, as by T.B. to A.B.; which plaintiff ought to be some real person, and not merely an ideal fictitious one who hath no existence, as is frequently, though unwarrantably, practised; it is

also stated, that A.B. the lessee entered, and that the defendant C.D. who is called the *casual ejector*, ousted him; for which ouster he brings this action. As soon as this action is brought, and the complaint fully stated in the declaration, C.D. the casual ejector, or defendant, sends a written notice to the tenant in possession of the lands, as E.F. informing him of the action brought by A.B. and transmitting him a copy of the declaration: withal assuring him that he, C.D. the defendant, has no title at all to the premises, and shall make no defence; and therefore advising the tenant to appear in court, and defend his own title; otherwise he, the casual ejector, will suffer judgment to be had against him, and thereby the actual tenant E.F. will inevitably be turned out of possession. On receipt of this friendly caution, if the tenant in possession do not within a limited time apply to the court to be admitted a defendant in the stead of C.D. he is supposed to have no right at all; and upon judgment being had against C.D. the casual ejector, E.F. the real tenant will be turned out of possession by the sheriff.

But if the tenant in possession applies to be made a defendant, it is allowed him upon this condition; that he enter into a rule of court to confess, at the trial of the cause, three of the four requisites for the maintenance of the plaintiff's action, *viz.* the *lease* of T.B. the lessor, the *entry* of A.B. the plaintiff, and his *ouster* by E.F. himself, now made the defendant instead of C.D.: which requisites being wholly fictitious, should the defendant put the plaintiff to prove them, he must of course be nonsuited for want of evidence; but by such stipulated confession of *lease*, *entry*, and *ouster*, the trial will now stand upon the merits of the *title* only. This done, the declaration is altered, by inserting the name of E.F. instead of C.D. and the cause goes down to trial under the name of A.B. (the plaintiff), on the demise of T.B. (the lessor), against E.F. (the new defendant). And therein the lessor of the plaintiff is bound to make out a clear title, otherwise his fictitious lessee cannot obtain judgment to have possession of the land for the term supposed to be granted. But if the lessor make out his title in a satisfactory manner, then judgment and a writ of possession shall go for A.B. the nominal plaintiff, who by this trial has proved the right of T.B. his supposed lessor.

To prevent fraudulent recoveries of the possession, by collusion with the tenant of the land, all tenants are obliged by the 11 Geo. II. c. 19. on pain of forfeiting three years' rent, to give notice to their landlords, when served with any declaration in ejectionment: and any landlord may, by leave of the court, be made a co-defendant to the action, in case the tenant himself appear to it; or if he make default, though judgment must be then signed against the casual ejector, yet execution shall be stayed, in case the landlord applies to be made a defendant, and enters into the common rule.

But if the new defendants, whether landlord or tenant, or both,

after entering into the common rule, fail to appear at the trial, and to confess lease, entry, and ouster, the plaintiff A. B. must indeed be there nonsuited, for want of proving those requisites; but judgment will in the end be entered against the casual ejector, C. D. for the condition on which E. F. or his landlord was admitted a defendant, is broken, and therefore the plaintiff is put again in the same situation as if he never had appeared at all; the consequence of which would have been, that judgment would have been entered for the plaintiff, and the sheriff, by virtue of a writ for that purpose, would have turned out E. F. and delivered possession to A. B. The same process therefore as would have been had, provided no conditional rule had been ever made, must now be pursued as soon as the condition is broken.

Where an ejectment is defended merely to continue the possession of the premises, and no defence is made at the trial, the practice is, for the cryer of the court, first, to call the defendant to confess lease, entry, and ouster, and then the plaintiff, as in other cases of nonsuits, to come forth, or he will lose his writ of *nisi prius*.

Though in this case the judgment be given against the casual ejector, yet the costs are taxed as in other cases; and if the real defendant refuse to pay them, the court will grant an attachment against him.

In like manner, if there be a verdict for the defendant, or the nominal plaintiff be nonsuited without the default of the defendant, the defendant must tax his costs, and sue out a writ of execution against the nominal plaintiff; and if, upon serving the lessor of the plaintiff with this writ, and a copy of the rule to confess lease, entry, and ouster, the lessor of the plaintiff do not pay the costs, the court will grant an attachment against him.

In ejectment, the unsuccessful party may re-try the same question as often as he pleases, without the leave of the court; for by making a fresh demise to another nominal character, it becomes the action of a new plaintiff upon another right, and the courts of law cannot any farther prevent this repetition of the action, than by ordering the proceedings in one ejectment to be stayed till the costs of a former ejectment, though brought in another court, be discharged.

But a court of equity, in some instances, where there have been several trials in ejectment for the same premises, and the title was entirely legal, has granted a perpetual injunction.

The damages recovered in these actions, though formerly their only intent, are now usually (since the title has been considered as the principal question) very small and inadequate; amounting commonly to one shilling, or some other trivial sum. In order therefore to complete the remedy, when the possession has been long detained from him that had the right to it, an action of trespass also lies, after a recovery in ejectment, to recover the meane profits which the tenant in possession has wrongfully received. Which action may be brought in the name of either the nominal plaintiff in the ejectment, or his lessor, against the tenant in pos-

session; whether he be made party to the ejectment, or suffer judgment to go by default. In this case the judgment in ejectment is conclusive evidence against the defendant for all profits which have accrued since the date of the demise stated in the former declaration of the plaintiff: but if the plaintiff sue for any antecedent profits, the defendant may make a new defence; and he may also plead the Statute of Limitations, and by that means protect himself from the payment of all mesne profits, except those which have accrued during the last six years.

But a writ of ejectment is not an adequate means to try the title of all estates; for on those things whereon an entry cannot in fact be made, no entry shall be supposed by any fiction of the parties. Therefore an ejectment will not lie of an advowson, a rent, a common, or other incorporeal hereditaments; except for tithes in the hands of lay appropriators, by the express purview of the 32 Hen. VIII. c. 7. which doctrine hath since been extended by analogy to tithes in the hands of the clergy; nor will it lie in such cases where the entry of him that hath right is taken away by descent, discontinuance, twenty years dispossession, or otherwise.

This action of ejectment is however rendered a very easy and expeditious remedy to landlords whose tenants are in arrear; for by the 4 Geo. II. c. 28. it is enacted, that every landlord, who hath by his lease a right of re-entry in case of nonpayment of rent, when half a year's rent is due, and no sufficient distress is to be had, may serve a declaration in ejectment on his tenant, or fix the same on some notorious part of the premises, which shall be valid without any formal re-entry or previous demand of rent. And a recovery in such ejectment shall be final and conclusive, both in law and equity, unless the rent and all costs be paid or tendered within six calendar months afterwards.

Ejectment must be brought for a thing that is certain; as of the manor of A, and so many messuages, cottages, acres of arable land, meadow, &c. with the appurtenances in the parish of, &c. For the nature of the land must be set forth, and be distinguished, how much of one sort, and how much of another. If a person bring ejectment of an acre of land in two parishes, and the whole is in one, he shall recover; so where an ejectment is of an acre of land in A, and part of it lies in B, he may recover for such part as lies in A. And if a man have title to a fourth part only, and he bring his action for the whole, he shall recover his fourth part of the lands.

In ejectment for nonpayment of rent, proceedings have been ordered to be stayed on payment of the rent and costs, and a new lease to be made at the defendant's charge. In cases between landlord and tenant, when half a year's rent is due from any tenant, the landlord may, without formal demand or re-entry, serve a declaration in ejectment against the tenant, or affix it on the door of the demised premises, &c.; and, proving the rent due,

and no sufficient distress, shall have judgment to recover the lands; but, upon the tenant's paying his rent in arrears with the costs, the proceedings in ejectment to cease: and the tenant may file a bill in equity to be relieved in six months, &c. and thereon shall hold the premises according to the lease, without a new one.

CHAPTER XIV.

Of Trespass.

TRESPASS, in its largest and most extensive sense, signifies any transgression or offence against the law of nature, of society, or of the country in which we live; whether it relate to a man's person or his property. Therefore, beating another is a trespass; for which an action of trespass *vi et armis* in assault and battery will lie; taking or detaining a man's goods are respectively trespasses, for which an action of trespass *vi et armis*, or on the case in trover and conversion, is given by the law: so also non-performance of premises or undertakings is a trespass, upon which an action of trespass on the case in *assumpsit* is grounded: and, in general, any misfeasance, or act of one man, whereby another is injuriously treated or damnified, is a transgression or trespass in its largest sense, for which an action of trespass *vi et armis* will lie; but if the injury be only consequential, a special action of trespass on the case may be brought.

The distinctions between actions of trespass *vi et armis* for an immediate injury, and actions of trespass on the case for a consequential damage, are frequently very delicate.

In a case where an action of trespass *vi et armis* was brought against the defendant for throwing a lighted squib in a public market, which fell upon a stall, the owner of which, to defend himself and his goods, took it up, and threw it to another part of the market, where it struck the plaintiff, and put out his eye; the question was much discussed, whether the person injured ought to have brought an action of trespass *vi et armis*, or an action upon the case; and one of the four judges strenuously contended that it ought to have been an action upon the case. But the question was more properly this, *viz.* Whether an action of trespass *vi et armis* lay against the original or the intermediate thrower; or whether the act of the second thrower was involuntary (which seems to have been the opinion of the jury), or wilful and mischievous; and if so, whether he alone ought to have been answerable for the consequences?

In the case of *Leame v. Bray*, it was decided, that if one man drive a carriage, being on the wrong side of the road, against another carriage, though unintentionally, the action ought to be trespass *vi et armis*; and the court declared generally, that if the injurious act be the immediate result of the force originally applied by the defendant, and the plaintiff be injured by it, it is the subject of an action of trespass *vi et armis*, by all the cases both ancient and modern.

Every unwarrantable entry on another man's land, by breaking his close, is a trespass. For every man's land is, in the eye of the law, inclosed and set apart from his neighbour's; and that either by a visible and material fence, as one field is divided from another by a hedge; or by an ideal invisible boundary, existing only in the contemplation of law, as when one man's land adjoins to another's in the same field. And every such entry or breach of a man's close carries necessarily along with it some damage or other.

One must have a property (either absolute or temporary) in the soil, and actual possession by entry, to be able to maintain an action of trespass; or, at least, it is requisite that the party have a lease and possession of the vesture and herbage of the land. Thus, if a meadow be divided annually among the parishioners by lot, then, after each person's several portion is allotted, they may be respectively capable of maintaining an action for the breach of their several closes; for they have an exclusive interest and freehold therein for the time.

But, before entry and actual possession, one cannot maintain an action of trespass, though he have the freehold in law. And therefore an heir before entry cannot have this action against an abator; though a disseisee might have it against the disseisor, for the injury done by the disseisin itself, at which time the plaintiff was seised of the land; but he cannot have it for any act done after the disseisin, until he hath gained possession by re-entry, and then he may well maintain it for the intermediate damage done.

By the 6 Ann. c. 18. if a guardian or trustee for any infant, a husband seised *jure uxoris*, or a person having any estate or interest determinable upon a life or lives, shall, after the determination of their respective interests, hold over and continue in possession of the lands or tenements, without the consent of the person entitled thereto, they are adjudged to be trespassers; and any reversioner or remainder-man, expectant on any life-estate, may once in every year, by motion to the Court of Chancery, procure the *cestuy qui vie* to be produced by the tenant of the land, or may enter thereon in case of his refusal or wilful neglect.

And by the 4 Geo. II. c. 28. and 11 Geo. II. c. 19. in case, after the determination of any term of life, lives, or years, any person shall wilfully hold over the same, the lessor or reversioner is entitled to recover by action of debt, either at the rate of double the annual value of the premises, in case he himself hath de-

manded and given notice in writing to the tenant, to deliver the possession; or else double the usual rent, in case the notice of quitting proceeds from the tenant himself, having power to determine his lease, and he afterwards neglect to carry that notice into execution.

A man is answerable for not only his own trespass, but that of his cattle also; for if, by his negligent keeping, they stray upon the land of another, and they there tread down his neighbour's herbage, and spoil his corn or his trees, this is a trespass for which the owner must answer in damages. And the law gives the party injured a double remedy in this case; by permitting him to distrain the cattle thus *damage feasant* or doing damage, till the owner shall make him satisfaction; or else by leaving him to the common remedy by action.

In some cases trespass is justifiable: as if a man come on another's land or house to demand or pay money, there payable; or to execute, in a legal manner, the process of the law.

Also a man may justify entering into an inn or public house, without the leave of the owner first specially asked; because when a man professes the keeping such inn or public house, he thereby gives a general licence to any person to enter his doors. A landlord may justify entering to distrain for rent; a commoner, to attend his cattle commoning on another's land; and a reversioner, to see if any waste be committed on the estate.

Also it hath been said, that by the common law and custom of England, the poor are allowed to enter and glean upon another's ground after the harvest, without being guilty of trespass. But two actions of trespass have been brought in the Common Pleas against gleaners, with an intent to try the general question, whether such a right existed: in the first, the defendant pleaded that he, being a poor, necessitous, and indigent person, entered the plaintiff's close to glean; in the second, the defendant's plea was as before, with the addition that he was an inhabitant legally settled within the parish: to the plea in each case there was a general demurrer. Mr. J. Gould delivered a learned judgment in favour of gleaning; but the other three judges were clearly of opinion, that this claim had no foundation in law; that the only authority to support it was an extra-judicial dictum of Lord Hale; that it was a practice incompatible with the exclusive enjoyment of property, and was productive of vagrancy, and many mischievous consequences.

In like manner the common law warrants the hunting of ravenous beasts of prey, as badgers and foxes, in another man's land: and it has been determined, that it is lawful to follow a fox with horses and hounds over another's grounds, provided no more damage is done than is necessary for the destruction of the animal.

But in cases where a man misdemeans himself, or makes an ill use of the authority with which the law entrusts him, he shall be accounted a trespasser *ab initio*: as if one come into a tavern,

and will not go out in a reasonable time, but tarries there all night, contrary to the inclinations of the owner; this wrongful act shall affect and have relation back even to his first entry, and make the whole a trespass.

But a mere nonfeasance, as not paying for the wine he calls for, will not make him a trespasser; for this is only a breach of contract, for which the taverner shall have an action of debt or *assumpsit* against him.

So if a landlord distrained for rent, and wilfully killed the distress, this by the common law made him a trespasser *ab initio*: and so indeed would any other irregularity have done, till the 11 Geo. II. c. 19. which enacts, that no subsequent irregularity of the landlord shall make his first entry a trespass; but the party injured shall have a special action of trespass, or on the case, for the real specific injury sustained, unless tender of amends hath been made. But still if a reversioner, who enters on pretence of seeing waste, break the house, or stay there all night; or if the commoner, who comes to tend his cattle, cut down a tree; in these and similar cases, the law judges that he entered for this unlawful purpose, and therefore, as the act which demonstrates such his purpose is a trespass, he shall be deemed a trespasser *ab initio*.

So also, in the case of hunting the fox or the badger, a man cannot justify breaking the soil, and digging him out of the earth; for though the law warrants the hunting of such noxious animals for the public good, yet it is held that such things must be done in an ordinary and usual manner; therefore, as there is an ordinary course to kill them, *viz.* by hunting, the court held that the digging for them was unlawful.

In order to prevent trifling and vexatious actions of trespass, as well as other personal actions, it is enacted by the 43 Eliz. c. 6. and 22 & 23 Car. II. c. 9. § 136. that where the jury who try an action of trespass give less damages than forty shillings, the plaintiff shall be allowed no more costs than damages; unless the judge shall certify under his hand, that the freehold or title of the land came chiefly in question. But this rule now admits of two exceptions more, which have been made by subsequent statutes. One is by the 8 & 9 W. III. c. 11. which enacts, that in all actions of trespass, wherein it shall appear that the trespass was wilful and malicious, and it be so certified by the judge, the plaintiff shall recover full costs. The other exception is by the 4 & 5 W. & M. c. 23. which gives full costs against any inferior tradesman, apprentice, or other dissolute person, who is convicted of a trespass in hawking, hunting, fishing, or fowling, upon another's land. Upon this statute it has been adjudged, that if a person be an inferior tradesman, as a clothier for instance, it matters not what qualification he may have in point of estate; but if he is guilty of such trespass, he shall be liable to pay full costs. The persons described in the 4 & 5 W. & M. c. 23. are subject to pay full costs, though the

damages are under 40s. without any certificate from the judge, or previous notice of the party. The words *inferior tradesman* are so vague, that the court of Common Pleas were divided in opinion, whether a person who was a surgeon and apothecary came under that description.

It has been decided, that a gentleman's huntsman is not a dissolute person under this act. And where the plaintiff states the defendant in his declaration to be a dissolute person or other person mentioned in the act, if he should not prove him so at the trial, still he may recover a verdict as in a common action of trespass.

CHAPTER XV.

Of Nuisances.

WE now come to the subject of NUISANCES. A nuisance signifies any thing that worketh hurt, inconvenience, or damage. Nuisances are of two kinds; *public* or *common*, which affect the public, and are an annoyance to all the king's subjects; and *private*, which may be defined, any thing done to the hurt or annoyance of the lands, tenements, or hereditaments of another.

With regard to such nuisances as are of a *public* nature, and therefore indictable, they will fall under another division of our work. At present we shall consider the latter description of nuisances.

If a man build a house so near to mine, that his roof overhangs my roof, and throws the water off his roof upon mine; this is a nuisance, for which an action will lie. Likewise to erect a house or other building so near to mine, that it obstructs my ancient lights and windows, is a nuisance. But in this latter case it is necessary that the windows be ancient, that is, have subsisted there a long time without interruption; otherwise there is no injury done. For he hath as much right to build a new edifice upon his ground, as I have upon mine; since every man may erect what he pleases upon the upright or perpendicular of his own soil, so as not to prejudice what has long been enjoyed by another; and it was my folly to build so near another's ground.

Also, if a person keep his hogs, or other noisome animals, so near the house of another, that the stench of them incommodes him, and makes the air unwholesome; this is an injurious nuisance, as it tends to deprive him of the use and benefit of his house.

A like injury is, if one's neighbour set up and exercise any offensive trade, as a tanner's, a tallow-chandler's, or the like; for though these are lawful and necessary trades, yet they should be exercised in remote places; this therefore is an actionable nuisance.

sance. So that the nuisances which affect a man's dwelling may be reduced to these three: 1. Overhanging it; 2. Stopping ancient lights; and, 3. Corrupting the air with noisome smells.

So also it will be a nuisance, if life be made uncomfortable by the apprehension of danger; it has therefore been held to be a nuisance, a misdemeanor, to keep great quantities of gunpowder near dwelling-houses.

But depriving one of a mere matter of pleasure, as of a fine prospect, by building a wall, or the like; this, as it abridges nothing really convenient or necessary, is no injury to the sufferer, and is therefore not an actionable nuisance.

As to nuisance to one's lands: if one erect a smelting-house for lead so near the land of another, that the vapour and smoke kills his corn and grass, and damages his cattle therein, this is held to be a nuisance. And by consequence it follows, that if one do any other act, in itself lawful, which yet being done in that place necessarily tends to the damage of another's property, it is a nuisance: for it is incumbent on him to find some other place to do that act where it will be less offensive. So also, if my neighbour ought to scour a ditch, and do not, whereby my land is overflowed, this is an actionable nuisance.

It is a nuisance to stop or divert water that uses to run to another's meadow or mill; to corrupt or poison a watercourse, by erecting a dye-house or a lime-pit, for the use of trade, in the upper part of the stream; or, in short, to do any act therein, that in its consequences must necessarily tend to the prejudice of one's neighbour.

Also, if I have a way annexed to my estate across another's land, and he obstructs me in the use of it, either by totally stopping it, or putting logs across it, or ploughing over it, it is a nuisance: for, in the first case, I cannot enjoy my right at all; and in the latter, I cannot enjoy it so commodiously as I ought.

Also, if I am entitled to hold a fair or market, and another person sets up a fair or market so near mine, that he does me a prejudice, it is a nuisance to the freehold which I have in my market or fair. But, in order to make this out to be a nuisance, it is necessary, 1. That my market or fair be the elder, otherwise the nuisance lies at my own door. 2. That the market be erected within the third part of twenty miles from mine; so that if the new market be not within seven miles of the old one, it is no nuisance: for it is held reasonable that every man should have a market within one third of a day's journey from his own home; that, the day being divided into three parts, he may spend one part in going, another in returning, and a third in transacting his necessary business there.

If such market or fair be on the same day with mine, it is *prima facie* a nuisance to mine, and there needs no proof of it, but the law will intend it to be so: but if it be on any other day, it *may* be a nuisance; though whether it is so or not, cannot be intended or presumed, but I must make proof of it to the jury.

If a ferry be erected on a river so near another ancient ferry as to draw away its custom, it is a nuisance to the owner of the old one. For where there is a ferry by prescription, the owner is bound to keep it always in repair and readiness; it would be therefore extremely hard, if a new ferry were suffered to share his profits, which does not also share his burden.

We are next to consider the remedies the law has provided against nuisances. And first, no action will lie for a public or common nuisance, but an *indictment* only; and no person, natural or corporate, can have an action for a public nuisance, or punish it. Yet this rule admits of one exception; where a private person suffers some extraordinary damage, beyond the rest of the king's subjects, by a public nuisance; in which case he shall have a private satisfaction by action. As if, by means of a ditch dug across a public way; which is a common nuisance, a man or his horse suffer any injury by falling therein; there, for this particular damage, which is not common to others, the party shall have his action:

Also, if a man have, of his own accord, abated or removed a nuisance, he is entitled to no action. For he had choice of two remedies; either without suit, by abating it himself by his own act, or by suit, in which he may both recover damages, and remove it by the aid of the law; but having made his election of one remedy, he is totally precluded from the other.

The remedy by suit is principally by an action on the case for damages; in which the party injured shall only recover a satisfaction for the injury sustained, but cannot thereby remove the nuisance. But every continuance of a nuisance is held to be a fresh one; and therefore a fresh action will lie.

By 1 & 2 Geo. IV. c. 41. which recites, that great inconvenience has arisen from the improper construction as well as negligent use of furnaces employed in the working of engines by steam, and whereas by law every such nuisance, being of a public nature, is abateable as such by indictment, but the expence attending the prosecution has deterred parties suffering thereby from seeking the remedy given by law, it is enacted, that it shall and may be lawful for the court, in case of conviction on any such indictment, to award such costs as shall be deemed proper and reasonable to the prosecutor; to be paid by the party convicted. § 1.

And if it shall appear that the grievance may be remedied by altering the construction of the furnace, it shall be lawful to the court, without the consent of the prosecutor, to make such order as shall be thought expedient for preventing the nuisance in future, before passing final sentence upon the defendant or defendants so convicted. § 2.

These provisions not to extend to any furnaces of steam engines erected solely for the purpose of working mines, or employed solely in the smelting of ores and minerals, or in the manufacturing of the produce of such ores or minerals on or immediately adjoining the premises where they are raised. § 3.

of estovers, if he choose so to consider it; for which he has his remedy to recover possession and damages by assise, if entitled to a freehold in such common; but if he have only a chattel interest, then he can only recover damages by an action on the case for this waste and destruction of the woods out of which his estovers were to issue.

But the most usual and important interest that is hurt by this commission of waste is that of him who hath the remainder or reversion of the inheritance after a particular estate for life or years in being. Here, if the particular tenant (be it the tenant in dower or courtesy, who was answerable for waste at the common law, or the lessee for life or years, who was first made liable by the Statutes of Marlbridge and of Gloucester) commit or suffer any waste, it is a manifest injury to him that has the inheritance, as it tends to mangle and dismember it of its most desirable incidents and ornaments, among which timber and houses may justly be reckoned the principal. To him therefore in remainder or reversion, to whom the inheritance appertains in expectancy, the law hath given an adequate remedy: but he who hath the remainder for life only is not entitled to sue for waste, since his interest may never perhaps come into possession, and then he hath suffered no injury.

Yet a parson, vicar, archdeacon, prebendary, and the like, who are seised in right of their churches of any remainder or reversion, may have an action of waste; for they, in many cases, have, for the benefit of the church and of the successor, a fee-simple qualified.

No person is entitled to an action of waste against a tenant for life, but he who has the immediate estate of inheritance in remainder or reversion, expectant upon the estate for life. If between the estate of the tenant for life who commits waste, and the subsequent estate of inheritance, there be interposed an estate of freehold to any person in *esse*, then, during the continuance of such interposed estate, the action of waste is suspended; and if the first tenant for life die during the continuance of such interposed estate, the action is gone for ever.

The redress for the injury of waste is of two kinds; preventive, and corrective: the former of which is by writ of *estrepement*, the latter by that of *waste*.

But, besides this preventive redress at common law, the Court of Chancery, upon bill exhibited therein, complaining of waste and destruction, will grant an injunction in order to stay waste, until the defendant shall have put in his answer, and the court shall thereupon make further order; which is now become the most usual way of preventing waste.

A writ of *waste* is an action partly founded upon the common law, and partly upon the Statute of Gloucester; and may be brought by him who hath the immediate estate of inheritance in reversion or remainder, against the tenant for life, tenant in dower, tenant by the courtesy, or tenant for years. This action is

also maintainable in pursuance of West. 2. by one tenant in common of the inheritance against another, who makes waste in the estate only in common. The equity of which statute extends to joint tenants, but not to coparceners; because, by the old law, coparceners might make partition, whenever either of them thought proper, and thereby prevent future waste; but tenants in common and joint tenants could not; and therefore the statute gave them this remedy, compelling the defendant either to make partition, and take the place wasted to his own share, or to give security not to commit any farther waste. But these tenants in common and joint tenants are not liable to the penalties of the Statute of Gloucester, which extends only to such as have life estates, and do waste to the prejudice of the inheritance. The waste, however, must be something considerable; for if it amount only to twelvenpence, or some such petty sum, the plaintiff shall not recover in an action of waste.

The action of waste is a mixed action; partly real, so far as it recovers land; and partly personal, so far as it recovers damages; for it is brought for both those purposes: and if the waste be proved, the plaintiff shall recover the thing or place wasted, and also treble damages, by the Statute of Gloucester.

When the waste and damages are ascertained, either by confession, verdict, or inquiry of the sheriff, judgment is given, in pursuance of the Statute of Gloucester, c. 5. that the plaintiff shall recover the place wasted: for which he has immediately a writ of *reisin*, provided the particular estate be still subsisting (for if it be expired, there can be no forfeiture of the land), and also that the plaintiff shall recover treble damages, assessed by the jury; which he must obtain in the same manner as all other damages in actions personal and mixed are obtained, whether the particular estate be expired, or still in being,

SUBTRACTION happens when any person who owes any suit, duty, custom, or service to another, withdraws or neglects to perform it. It differs from a disseisin, in that *this* is committed without any denial of the right, consisting merely of non-performance; *that* strikes at the very title of the party injured, and amounts to an ouster, or actual dispossession.

Fealty, suit of court, and rent, are duties and services usually issuing and arising *ratione tenuræ*, being the conditions upon which the ancient lords granted out their lands to their feudatories: whereby it was stipulated, that they and their heirs should take the oath of fealty or fidelity to their lord, which was the feudal bond, or *commune vinculum* between lord and tenant; that they should do suit, or duly attend and follow the lord's courts, and there from time to time give their assistance, by serving on juries, either to decide the property of their neighbours in the court-baron, or correct their misdemeanors in the court-leet; and, lastly, that they should yield to the lord certain annual stated returns, in military attendance, in provisions, in arms, in matters of ornament or pleasure, in rustic employments or prædial labour,

or (which is *inftar omnium*) in money, which will provide all the rest: all which are comprised under the one general name of *reditus*, return, or rent. And the subtraction or non-observance of any of these conditions, by neglecting to swear fealty, to do suit of court, or to render the rent or service reserved, is an injury to the freehold of the lord, by diminishing and depreciating the value of his seignory.

The general remedy for all these is by *distress*, and it is the only remedy at the common law for the two first of them. And although, in all cases, distress must be moderate, yet for fealty or suit of court no distress can be unreasonable, immoderate, or too large: for this is the only remedy to which the party aggrieved is entitled, and therefore it ought to be such as is sufficiently compulsory; and, be it of what value it will, there is no harm done, especially as it cannot be sold or made away with, but must be restored immediately on satisfaction made. A distress of this nature, that has no bounds with regard to its quantity, and may be repeated from time to time, until the stubbornness of the party is conquered, is called a *distress infinite*.

There are other remedies for subtraction of rents or services; but the most usual is by action of debt. This is the most usual remedy, when recourse is had to any action at all for the recovery of pecuniary rents, to which species of render almost all free services are now reduced, since the abolition of the military tenures. But for a freehold rent, reserved on a lease for life, &c. no action of debt lay by the common law, during the continuance of the freehold out of which it issued; for the law would not suffer a real injury to be remedied by an action that was merely personal. However, by the 8 Ann. c. 14. and 5 Geo. III. c. 17. action of debt may now be brought at any time to recover such freehold rents.

CHAPTER XVII.

Of Disturbance.

DISTURBANCE is a wrong done to some incorporeal hereditament, by hindering or disquieting the owners in their regular and lawful enjoyment of it. This injury is of five sorts:—1. Disturbance of franchises; 2. Disturbance of common; 3. Disturbance of ways; 4. Disturbance of tenure; 5. Disturbance of patronage.

Disturbance of franchises happens, when a man has the franchise of holding a court leet, of keeping a fair or market, or free-warren, of taking toll, of seizing waifs or estrays, or, in short,

any other species of franchise whatsoever, and he is disturbed or incommoded in the lawful exercise thereof. The remedy for these injuries is by a special action on the case.

The *disturbance of common* is, where any act is done, by which the right of another to his common is incommoded or diminished. This may happen, in the first place, where one who hath no right of common puts his cattle into the land, and thereby robs the cattle of the commoners of their respective shares of the pasture. Or if one who hath a right of common put in cattle which are not commonable, as hogs and goats. But the lord of the soil may (by custom or prescription, but not without) put a stranger's cattle into the common; and also, by a like prescription for common appurtenant, cattle that are not commonable may be put into the common. The lord also of the soil may justify making burrows therein, and putting in rabbits, so as they do not increase to so large a number as totally to destroy the common. But in general, in case the beasts of a stranger, or the uncommonable cattle of a commoner, be found upon the land, the lord or any of the commoners may distrain them *damage feasant*; or the commoner may bring an action on the case to recover damages, provided the injury done be any thing considerable, so that he may lay his action with a *per quod*, or allege that thereby he was deprived of his common. But for a trivial trespass the commoner has no action; but the lord of the soil only, for the entry and trespass committed.

Another disturbance of common is by surcharging it; or putting more cattle therein than the pasture and herbage will sustain, or the party hath a right to do.

The usual remedies for surcharging the common are, either by distraining so many of the beasts as are above the number allowed, or else by an action of trespass; both which may be had by the lord; or, lastly, by a special action on the case for damages, in which any commoner may be plaintiff.

There is yet another disturbance of common, when the owner of the land, or other person, so incloses it, or otherwise obstructs it, that the commoner is precluded from enjoying the benefit to which he is by law entitled. This may be done either by erecting fences, or by driving the cattle off the land, or by ploughing up the soil of the common. Or it may be done by erecting a warren therein, and stocking it with rabbits in such quantities, that they devour the whole herbage, and thereby destroy the common. For this injury an action will lie against the owner.

Another species of disturbance, that of *ways*, is very similar in its nature to the last; it principally happening, when a person, who hath a right to a way over another's grounds by grant or prescription, is obstructed by inclosures or other obstacles, or by ploughing across it; by which means he cannot enjoy his right of way, or at least not in so commodious a manner as he might have done. If this be a way annexed to his estate, and the obstruction be made by the tenant of the land, this brings it to another species

of injury; for it is then a *nuisance*. But if the right of way thus obstructed by the tenant be only in *gross* (that is, annexed to a man's person, and unconnected with any lands or tenements), or if the obstruction of a way belonging to a house or land be made by a stranger, it is then in either case merely a disturbance: for the obstruction of a way in gross is no detriment to any lands or tenements, and therefore does not fall under the legal notion of a nuisance; and the obstruction of it by a stranger can never tend to put the *right* of way in dispute: the remedy therefore for these disturbances is not by assize or any real action, but by the universal remedy of action on the case to recover damages.

Disturbance of *tenure* is the breaking the connexion between landlord and tenant. So that if there be a tenant at will of any lands or tenements, and a stranger, either by menaces or threats, or by unlawful distresses, or by fraud and circumvention, or other means, contrive to drive them away, or inveigle him to leave his tenancy, this the law construes a wrong and injury to the landlord, and gives him a reparation in damages, by a special action on the case.

Disturbance of *patronage* is an hindrance or obstruction of a patron to present his clerk to a benefice.

Disturbers of a right of advowson may be three persons; the pseudo-patron, his clerk, and the ordinary: the pretended patron, by presenting to a church to which he has no right; the clerk, by demanding or obtaining institution; and the ordinary, by refusing to admit the real patron's clerk, or admitting the clerk of the pretender. For these disturbances the law (besides the writ of *right of advowson*, which is a final and conclusive remedy) hath given the patron two inferior possessory actions for his relief; an assize of *darrein presentment*, and a writ of *quare impedit*; in which the patron is always the plaintiff, and not the clerk. The assize of *darrein presentment* is now totally disused, a *quare impedit* being a more general, and therefore a more usual action: for the assize of *darrein presentment* lies only where a man has an advowson by descent from his ancestors; but the writ of *quare impedit* is equally remediable whether a man claims title by descent or by purchase.

We proceed, therefore, to inquire into the nature of a writ of *quare impedit*, now the only action used in disturbance of patronage; and shall first premise the usual proceedings previous to the bringing of the writ.

Upon the vacancy of a living, the patron is bound to present within six calendar months, otherwise it will lapse to the bishop. But if the presentation be made within that time, the bishop is bound to admit and institute the clerk, if found sufficient; unless the church be full, or there be notice of any litigation. For if any opposition be intended, it is usual for each party to enter a *caveat* with the bishop, to prevent his institution of the antagonist's clerk.

An institution after a *caveat* entered is void by the ecclesiastical law: but this the temporal courts pay no regard to, and look upon a *caveat* as a mere nullity. But if two presentations be offered to the bishop upon the same avoidance, the church is then said to become *litigious*; and if nothing farther be done, the bishop may suspend the admission of either, and suffer a lapse to incur. Yet if the patron or clerk on either side request him to award a *jus patronatus*, he is bound to do it.

A *jus patronatus* is a commission from the bishop, directed usually to his chancellor and others of competent learning; who are to summon a jury, of six clergymen and six laymen, to inquire into and examine who is the rightful patron; and if, upon such inquiry made, and certificate thereof returned to the commissioners, he admits and institutes the clerk of that patron whom they return as the true one, the bishop secures himself at all events from being a disturber.

The clerk refused by the bishop may also have a remedy against him in the spiritual court, denominated *duplex querela*; which is a complaint in the nature of an appeal from the ordinary to his next immediate superior, as from a bishop to the archbishop, or from an archbishop to the delegates; and if the superior court adjudge the cause of refusal to be insufficient, it will grant institution to the appellant.

Thus far matters may go on in the mere ecclesiastical course: but in contested presentations they seldom go so far; for, upon the first delay or refusal of the bishop to admit his clerk, the patron usually brings his writ of *quare impedit* against the bishop, for the temporal injury done to his property in disturbing him in his presentation. And if the delay arise from the bishop alone, as upon pretence of incapacity, or the like, then he only is named in the writ: but if there be another presentation set up, then the pretended patron and his clerk are also joined in the action; or it may be brought against the patron and clerk, leaving out the bishop; or against the patron only. But it is most advisable to bring it against all three: for if the bishop be left out, and the suit be not determined till the six months are past, the bishop is entitled to present by lapse; for he is not party to the suit: but if he be named, no lapse can possibly accrue till the right is determined.

If the patron be left out, and the writ be brought only against the bishop and the clerk, the suit is of no effect, and the writ shall abate; for the right of the patron is the principal question in the cause.

If the clerk be left out, and have received institution before the action brought (as is sometimes the case), the patron by this suit may recover his right of patronage, but not the present turn; for he cannot have judgment to remove the clerk, unless he be made a defendant, and party to the suit, to hear what he can allege against it. For which reason it is the safer way to insert all three in the writ.

The writ of *quare impedit* commands the disturbers, the bishop, the pseudo-patron, and his clerk, to permit the plaintiff to present a proper person (without specifying the particular clerk) to such a vacant church, which pertains to his patronage, and which the defendants (as he alleges) do obstruct; and unless they so do, then that they appear in court to shew the reason why they hinder him.

Immediately on the suing out of the *quare impedit*, if the plaintiff suspect that the bishop will admit the defendant's or any other clerk pending the suit, he may have a prohibitory writ, called a *ne admittas*; which recites the contention begun in the king's courts, and forbids the bishop to admit any clerk whatsoever till such contention be determined. And if the bishop do, after the receipt of this writ, admit any person, even though the patron's right may have been found in a *jure patronatus*, then the plaintiff, after he has obtained judgment in the *quare impedit*, may remove the incumbent, if the clerk of a stranger, by writ of *scire facias*; and shall have a special action against the bishop, called a *quare incumbavit*, to recover the presentation, and also satisfaction in damages for the injury done him by encumbering the church with a clerk pending the suit, and after the *ne admittas* received.

But if the bishop have encumbered the church by instituting the clerk before the *ne admittas* issued, no *quare incumbavit* lies; for the bishop hath no legal notice, till the writ of *ne admittas* be served upon him. The patron is therefore left to his *quare impedit* merely.

Besides these possessory actions, there may also be had a writ of *right of advowson*, which resembles other writs of right; the only distinguishing advantage now attending it being, that it is more conclusive than a *quare impedit*, since to an action of *quare impedit* a recovery had in a writ of right may be pleaded in bar.

There is no limitation with regard to the time within which any actions touching advowsons are to be brought, at least none later than the times of Richard I. and Henry III.; for by the 1 M. st. 2. c. 4. the Statute of Limitations (32 Hen. VIII. c. 2.) is declared not to extend to any writ of right of advowson, *quare impedit*, or assize of *darrein presentment*, or *jus patronatus*.

The presentation to such benefices as belong to Roman Catholic patrons is vested in and secured to the two universities. And by the 12 Ann. st. 2. c. 14. § 4. a new method of proceeding is provided; viz. that besides the writs of *quare impedit*, which the universities as patrons are entitled to bring, they or their clerks may be at liberty to file a bill in equity against any person presenting to such livings and disturbing their right of patronage, or his *cestuy qui trust*, or any other person whom they have cause to suspect, in order to compel a discovery of any secret trusts, for the benefit of Papists, in evasion of those laws whereby this right of advowson is vested in those learned bodies; and also, by the

11 Geo. II. c. 17. to compel a discovery whether any grant or conveyance, said to be made of such advowson, were made *boni fide* to a Protestant purchaser, for the benefit of Protestants, and for a full consideration; without which requisites every such grant and conveyance of any advowson or avoidance is absolutely null and void.

When a clerk is once in possession of his benefice, the law gives him the same possessory remedies to recover his glebe, his rents, his tithes, and other ecclesiastical dues, by writ of entry, assize, ejectment, debt, or trespass, (as the case may happen) which it furnishes to the owners of lay property.

CHAPTER XVIII.

Of the Original Writ.

HAVING gone through the several species of civil injuries, or private wrongs, committed against the persons and property of individuals, and pointed out the different remedies for them; we shall now shew the manner in which those remedies are pursued in the courts of law and equity; and shall then give some account of the courts themselves, in which their different authorities and jurisdictions will be pointed out.

In treating of remedies by action at common law, we shall confine ourselves to the *modern* practice; and, as the most natural and perspicuous way of considering the subject, shall pursue it in the order and method wherein the proceedings themselves follow each other. The general and orderly parts of a suit are these: 1. The original writ; 2. The process; 3. The pleadings; 4. The issue, or demurrer; 5. The trial; 6. The judgment, and its incidents; 7. The proceedings in nature of appeals; 8. The execution.

First, then of the ORIGINAL WRIT, which is the beginning or foundation of an action. When a person hath received an injury, he is to consider what redress the law has given for it; and thereupon is to make application or suit to the crown, for that particular specific remedy which he is determined to pursue. As, for money due on bond, an action of *debt*; for goods detained without force, an action of *detinue* or *trover*; or, if taken by force, an action of trespass *vi et armis*; or, to try the title of lands, a writ of *entry*, or action of trespass in *ejectment*; or, for any consequential injury received, a special action *on the case*. To this end he is to sue out an original writ from the Court of Chancery; which is a mandatory letter from the king, in parchment, sealed with the great seal, and directed to the sheriff of the county

wherein the injury is committed, requiring him to command the party accused, either to do justice to the complainant, or else to appear in court, and answer the accusation against him. Whatever the sheriff does in pursuance of this writ, he must *return* or certify to the Court of Common Pleas, together with the writ itself; which is the foundation of the jurisdiction of this court, being the king's warrant for the judges to proceed to the determination of the cause.

Original writs are either *optional* or *peremptory*; or, they are either a *præcipe*, or a *si fecerit te securum*.

The *præcipe* is the alternative, commanding the defendant to do the thing required, or shew the reason wherefore he hath not done it. The use of this writ is where something certain is demanded by the plaintiff, which it is incumbent on the defendant himself to perform; as, to restore the possession of land, to pay a certain liquidated debt, to perform a specific covenant, to render an account, and the like: in all which cases, the writ is drawn up in the form of a *præcipe*, or command, to do thus, or shew cause to the contrary, giving the defendant his choice, to redress the injury, or stand the suit.

The other species of original writ is called a *si fecerit te securum*, from the words of the writ; which directs the sheriff to cause the defendant to appear in court, without any option given him, provided the plaintiff gives the sheriff security effectually to prosecute his claim. This writ is in use, where nothing is specifically demanded, but only a satisfaction in general; to obtain which, and minister complete redress, the intervention of some judicature is necessary. Such are writs of trespass, or on the case, wherein no debt or other specific thing is sued for in certain, but only damages to be assessed by a jury. For this end the defendant is immediately called upon to appear in court, provided the plaintiff gives good security of prosecuting his claim.

Both species of writs are *teste'd*, or witnessed, in the king's own name—"Witness myself at Westminster," or wherever the chancery may be held.

The security here spoken of, to be given by the plaintiff for prosecuting his claim, is common to both writs, though it gives denomination only to the latter. The whole of it is at present become a mere matter of form, and John Doe and Richard Roe are always returned as the standing pledges for this purpose.

The day on which the defendant is ordered to appear in court, and on which the sheriff is to bring in the writ, and report how far he has obeyed it, is called the return of the writ; it being then returned by him to the king's justices at Westminster. And it is always made returnable at the distance of at least fifteen days from the date or *teste*, that the defendant may have time to come up to Westminster, even from the most remote parts of the kingdom, and upon some day in one of the four *terms* in which the court sits for the dispatch of business.

There are in each of these terms stated days called *days in bank*,

that is, days of appearance in the court of Common' Bench. : They are generally at the distance of about a week from each other. On some one of these days in bank all original writs must be made returnable; and therefore they are generally called the *returns* of that term.

The first return in every term is, properly speaking, the first day in that term; as, for instance, the octave of St. Hilary, or the eighth day inclusive after the feast of that saint; which falling on the 13th of January, the octave therefore, or first day of Hilary term, is the 20th of January. And thereon the court sits to take *excuses*, or excuses, for such as do not appear according to the summons of the writ; wherefore this is usually called the *essoign day* of the term. But on every return-day in the term, the person summoned has three days of grace beyond the day named in the writ, in which to make his appearance; and if he appear on the fourth day inclusive, it is sufficient. And therefore, at the beginning of each term, the court does not usually sit for the dispatch of business till the *fourth*, or *appearance* day; as, in Hilary term, on the 23d of January; and in Trinity term, not till the *fifth* day, the *fourth* happening on the great Popish festival of Corpus Christi; which days are therefore called and set down in the almanacks as the first days in the term: and the court also sits till the *quarto die post*, or appearance day of the last return, which is therefore the end of each of them,

CHAPTER XIX.

Of Process.

THE next step for carrying on the suit is called the PROCESS; being the means of compelling the defendant to appear in court. This is sometimes called *original* process, being founded upon the original writ; and also to distinguish it from *mesne* or intermediate process, which issues pending the suit upon some collateral interlocutory matter, as to summon juries, witnesses, and the like. *Mesne* process is also sometimes put in contradistinction to *final* process, or process of *execution*; and then it signifies all such process as intervenes between the beginning and the end of a suit.

But process, as we are now to consider it, is the method taken by the law to compel a compliance with the original writ, of which the primary step is by giving the party notice to obey it. This notice is given upon all real *præcipes*, and also upon all personal writs for injuries not against the peace, by *summons*; which is a warning to appear in court at the return of the original writ, given

to the defendant by two of the sheriff's messengers called *summoners*, either in person or left at his house.

If the defendant disobey this verbal monition, the next process is by writ of *attachment*. This is a writ issuing not out of Chancery, but out of the Court of Common Pleas, being grounded on the non-appearance of the defendant at the return of the original writ; and thereby the sheriff is commanded to attach him, by taking *gage*, that is, certain of his goods, which he shall forfeit if he do not appear; or by making him find *safe pledges*, or sureties, who shall be amerced in case of his non-appearance.

If, after *attachment*, the defendant neglect to appear, he not only forfeits his security, but is moreover to be farther compelled by writ of *distringas*, or *distress infinite*; which is a subsequent process, commanding the sheriff to restrain the defendant from time to time, and continually afterwards, by taking his goods and the profits of his lands, which are called *issues*, and which by the common law he forfeits to the king, if he do not appear. But now the issues may be sold, if the court shall so direct, in order to defray the reasonable costs of the plaintiff.

If therefore the defendant, being summoned or attached, make default, and neglect to appear; or if the sheriff return a *nil*, or that the defendant hath nothing whereby he may be summoned, attached, or distrained, the *capias* now usually issues; being a writ commanding the sheriff to take the body of the defendant, if he may be found within his bailiwick or county, and him safely to keep, so that he may have him in court on the day of return, to answer to the plaintiff of a plea of debt, or trespass, &c. as the case may be.

This is the regular and orderly method of process. But it is now usual, in practice, to sue out the *capias* in the first instance, upon a supposed return of the sheriff; especially if it be suspected that the defendant, upon notice of the action, will abscond; and afterwards a fictitious original is drawn up, if the party is called upon so to do, with a proper return thereupon, in order to give the proceedings a colour of regularity.

When this *capias* is delivered to the sheriff, he by his undersheriff grants a warrant to his inferior officers, or bailiffs, to execute it on the defendant. And if the sheriff of the county in which the injury is supposed to be committed, and the action is laid, cannot find the defendant in his jurisdiction, he returns, that he is not found, *non est inventus*, in his bailiwick; whereupon another writ issues, called a *testatum capias*, directed to the sheriff of the county where the defendant is supposed to reside, reciting the former writ, and that it is testified *testatum est*, that the defendant lurks or wanders in his bailiwick, wherefore he is commanded to take him, as in the former *capias*.

But where a defendant absconds, and the plaintiff would proceed to an outlawry against him, an original writ must then be sued out regularly, and after that a *capias*. And if the sheriff cannot find the defendant upon the first writ of *capias*, and return

a *non est inventus*, there issues out an *alias* writ, and after that a *pluries*, to the same effect as the former; only after these words, "We command you," this clause is inserted, "as we have formerly," or, "as we have often commanded you,"—"sicut alias," or "*sicut pluries præcipimus*." And if a *non est inventus* be returned upon all of them, then a writ of *exigent* or *exigi facias* may be sued out, which requires the sheriff to cause the defendant to be proclaimed, required, or exacted, in five county courts successively, to render himself; and if he do, then to take him, as in a *capias*; but if he do not appear, and is returned *quinto exactus*, he shall then be outlawed by the coroners of the county.

Also, by 6 Hen. VIII. c. 4. and 31 Eliz. c. 3. whether the defendant dwell within the same or another county than that wherein the *exigent* is sued out, writ of *proclamation* shall issue out at the same time with the *exigent*, commanding the sheriff of the county, wherein the defendant dwells, to make three proclamations thereof, in places the most notorious, and most likely to come to his knowledge, a month before the outlawry shall take place. Such *outlawry* is putting a man out of the protection of the law, so that he is incapable of bringing an action for redress of injuries; and it is also attended with a forfeiture of all his goods and chattels to the king.

Such is the first process in the Court of *Common Pleas*.

In the *King's Bench* they may also (and frequently do) proceed in certain causes by original writ, with *attachment* and *capias* thereon, returnable not at Westminster, where the *Common Pleas* are now fixed in consequence of *Magna Charta*, but "*ubicunque fuerimus in Angliâ*," wheresoever the king shall then be in England; the *King's Bench* being removable into any part of England at the pleasure of the crown.

But the more usual method of proceeding in the *King's Bench* is without any original, but by a peculiar species of process entitled a *bill of Middlesex*; and therefore so entitled, because the court now sits in that county; for if it sat in Kent, it would then be a *bill of Kent*. The *bill of Middlesex* (which was formerly always founded on a plaint of trespass entered on the records of the court) is a kind of *capias* directed to the sheriff of that county, and commanding him to take the defendant, and have him before our lord the king at Westminster on a day prefixed, to answer to the plaintiff of a plea of trespass. For this accusation of trespass it is that gives the Court of *King's Bench* jurisdiction in other civil causes; since, when once the defendant is taken into custody of the marshal or prison-keeper of this court for the supposed trespass, he being then a prisoner of this court, may here be prosecuted for any other species of injury. Yet, in order to found this jurisdiction, it is not necessary that the defendant be actually the marshal's prisoner; for, as soon as he appears, or puts in bail to the process, he is deemed by so doing to be in such custody of the marshal as will give the court a jurisdiction to proceed.

This bill of Middlesex must be served on the defendant by the sheriff, if he find him in that county: but if he return "*non est inventus*," then there issues out a writ of *latitat* to the sheriff of another county, as Berks; which is similar to the *testatum capias* in the Common Pleas, and recites the bill of Middlesex and the proceedings thereon, and that it is testified that the defendant lurks and wanders about in Berks, and therefore commands the sheriff to take him, and have his body in court on the day of the return.

But as in the Common Pleas a *testatum capias* may be sued out upon only a supposed, and not an actual preceding *capias*; so in the King's Bench a *latitat* is usually sued out upon only a supposed, and not an actual *bill of Middlesex*. So that, in fact, a *latitat* may be called the first process in the Court of King's Bench, as the *testatum capias* is in the Common Pleas. Yet, as in the Common Pleas, if the defendant live in the county wherein the action is laid, a common *capias* suffices; so in the King's Bench likewise, if he live in Middlesex, the process must still be by *bill of Middlesex* only.

In the *Exchequer*, the first process is by writ of *quo minus*, in order to give the court a jurisdiction over pleas between party and party. In which writ the plaintiff is alleged to be the king's farmer or debtor, and that the defendant hath done him the injury complained of, *quo minus sufficiens existit*, by which he is the less able to pay the king his rent, or debt. And upon this the defendant may be arrested, as upon a *capias* from the Common Pleas.

If the sheriff have found the defendant upon any of the former writs, the *capias*, or *latitat*, he serves him with the copy of the writ or process, and with notice in writing to appear by his attorney in court to defend this action; which in effect reduces it to a mere summons. And if the defendant think proper to appear upon this notice, his appearance is recorded, and he puts in sureties for his future attendance and obedience; which sureties are called *common bail*, being the same two imaginary persons that were pledges for the plaintiff's prosecution, John Doe and Richard Roe. Or, if the defendant do not appear upon the return of the writ, or within four (or in some cases eight) days after,* the plaintiff may enter an appearance for him, as if he had already appeared; and may file common bail in the defendant's name, and proceed thereupon as if the defendant had done it himself.

But if the plaintiff will make affidavit, that the cause of action amounts to fifteen pounds or upwards, or ten pounds upon bills or notes, then he may arrest the defendant, and make him put in *special*

* In all cases where the defendant is served with a copy of the process, he has eight days to file common bail in the King's Bench, or to enter a common appearance in the Common Pleas, exclusive of the return day; and if the last of the eight days be a Sunday, he has all the next day. 1 *Crompt. Prac.* 48. 1 *Burr.* 56.

bill. In order to which it is required by the 13 Car. II. st. 2. c. 2. that the true cause of action should be expressed in the body of the writ or process; else no security can be taken in a greater sum than forty pounds. The sum sworn to by the plaintiff is marked upon the back of the writ; and the sheriff, or his officer the bailiff; is then obliged actually to arrest, or take into custody, the body of the defendant, and having so done, to return the writ with a *cepi corpus* indorsed thereon.

ARREST.

An arrest must be by corporal seizing, or touching the defendant's body: after which the bailiff may justify breaking open the house in which he is, to take him; otherwise he has no such power, but must watch his opportunity to arrest him. For every man's house is looked upon by the law to be his castle of defence and asylum, wherein he should suffer no violence.

Peers of the realm, members of parliament, and corporations, are privileged from arrests, and of course from outlawries. And against them the process to enforce an appearance must be by summons and distress infinite, instead of a *capias*. Also clerks, attorneys, and all other persons attending courts of justice, (for attorneys, being officers of the court, are always supposed to be there attending) are not liable to be arrested by the ordinary process of the court, but must be sued by *bill* (called usually a *bill of privilege*); as being personally present in court.

Clergymen performing divine service, and not merely staying in the church with a fraudulent design, are, for the time, privileged from arrests. Suitors, witnesses, and other persons necessarily attending any courts of record upon business, are not to be arrested during their actual attendance, which includes their necessary coming and returning. And no arrest can be made in the king's presence, nor within the verge of his royal palace, nor in any place where the king's justices are actually sitting. And lastly, no arrest can be made, nor process served upon a Sunday, except for treason, felony, or a breach of the peace.

A bailiff, before he has made the arrest, cannot break open an outer door of a house; but if he enter the outer door peaceably, he may then break open the inner door, though it be the apartment of a lodger, if the owner himself occupies part of the house. But if the whole house be let in lodgings, as each lodging is then considered a dwelling-house, in which burglary may be stated to have been committed, so in that case the door of each apartment should be considered as an outer door, which could not be legally broken open to execute an arrest. It is not necessary that the arrest should be made by the hand of the bailiff, nor that he should be actually in sight; yet where an arrest is made by his assistant or follower, the bailiff ought to be so near as to be considered as acting in it.

BAIL.

When the defendant is regularly arrested, he must either go to prison for safe custody, or put in special bail to the sheriff. For the intent of the arrest being only to compel an appearance in court at the return of the writ, that purpose is equally answered, whether the sheriff detains his person, or takes sufficient security for his appearance, called *bail*. The method of putting in bail to the sheriff is by entering into a bond or obligation, with one or more sureties (not fictitious persons, as in the former case of common bail, but real, substantial, responsible bondsmen), to insure the defendant's appearance at the return of the writ; which obligation is called the *bail-bond*.

The sheriff, if he please, may let the defendant go without any sureties, but that is at his own peril; for, after once taking him, the sheriff is bound to keep him safely, so as to be forthcoming in court, otherwise an action lies against him for an escape. But, on the other hand, he is obliged to take (if it be tendered) a sufficient bail-bond; and by the 12 Geo. I. c. 29. the sheriff shall take bail for no other sum than such as is sworn to by the plaintiff, and indorsed on the back of the writ.

Upon the return of the writ, or within four days after,* the defendant must *appear* according to the exigency of the writ. This appearance is effected by putting in and justifying bail to the action, which is commonly called putting in bail *above*. If this be not done, and the bail that were taken by the sheriff *below*, are responsible persons, the plaintiff may take an assignment from the sheriff of the bail-bond, and bring an action thereupon against the sheriff's bail. But if the bail, so accepted by the sheriff, be insolvent persons, the plaintiff may proceed against the sheriff himself, by calling upon him, first, to return the writ (if not already done), and afterwards to bring in the body of the defendant. And if the sheriff do not then cause sufficient bail to be put in and perfected *above*, he will himself be responsible to the plaintiff.

The bail *above*, or bail to the action, must be put in either in open court, or before one of the judges; or else, in the country, before a commissioner appointed for that purpose, which must be transmitted to the court. And, by 57 Geo. III. c. 11. any one of the judges of the Court of King's Bench is authorized to sit apart from the other judges, in some place in or near to Westminster Hall, for the business of adding and justifying special bail. These bail, who must at least be two in number, must enter into a recognizance in a sum equal (or in some cases double) to that which the plaintiff has sworn to; whereby they do jointly and severally

* In London and Middlesex, special bail in the King's Bench must be put in within four days, exclusive of the return of the writ; in any other county, within six days: but if the last day fall on a Sunday, it may then be put in on the Monday following. In any other county, where the action is brought in the Common Pleas, special bail may be put in within eight days. 1 *Comp. Prac.* 59.

undertake, that if the defendant be condemned in the action, he shall pay the costs and condemnation, or render himself a prisoner, or that they will pay it for him; which recognizance is transmitted to the court on a slip of parchment entitled a bail-piece. And, if excepted to, the bail must be *perfected*, that is, they must *justify* themselves in court, or before the commissioner in the country, by swearing themselves housekeepers, and each of them to be worth the full sum for which they are bail, after payment of their debts.

Special bail is required, as of course, only upon actions of debt, or actions on the case in trover, or for money due, where the plaintiff can swear that the cause of action amounts to ten pounds: but in actions where the damages are precarious, being to be assessed *ad libitum* by a jury, as in actions for words, ejectment, or trespass, it is very seldom possible for the plaintiff to swear to the amount of his cause of action; and therefore no special bail is taken thereon, unless by a judge's order, or the particular directions of the court, in some peculiar species of injuries, as in cases of mayhem, or atrocious battery, or upon such special circumstances as make it absolutely necessary that the defendant shall be kept within the reach of justice.

Also in actions against heirs, executors, and administrators, for debts of the deceased, special bail is not demandable; for the action is not so properly against them in person as against the effects of the deceased in their possession. But special bail is required even of them in actions for a *devastavit*, or wasting the goods of the deceased; that wrong being of their own committing.

CHAPTER XX.

Of Pleadings.

PLEADINGS are the mutual altercations between the plaintiff and defendant; which, at present, are set down and delivered into the proper office in writing.

The first of these is the *declaration (narratio)*, or *count*, in which the plaintiff sets forth his cause at length; being an amplification or exposition of the original writ upon which his action is founded, with the additional circumstances of time and place, when and where the injury was committed.

In actions where possession of land is to be recovered, or damages for an actual trespass, or for waste, the plaintiff must lay his declaration, or declare his injury to have happened, in the very county and place in which it really did happen; but for debt, detinue, slander, and the like, the plaintiff may declare in what county he pleases, and then the trial must be had in that county in which the declaration is laid. Though if the defendant will make affi-

davit, that the cause of action (if any) arose not in that, but in another county, the court will direct a change of the *venue*, and will oblige the plaintiff to declare in the other county; unless he will undertake to give material evidence in the first. But if he fail to produce at the trial material evidence of the cause of action in the county in which he has laid it; he must be nonsuited, though he might have recovered a verdict in another county.

It is usual, in actions upon the case, to set forth several cases by different *counts* in the same declaration; so that if the plaintiff fail in the proof of one, he may succeed in another. As, in an action on the case upon an *assumpsit* for goods sold and delivered, the plaintiff usually counts or declares, first, upon a settled and agreed price between him and the defendant, as that they bargained for twenty pounds; and, lest he should fail in the proof of this, he counts likewise upon a *quantum valebant*, that the defendant bought other goods, and agreed to pay him so much as they were reasonably worth, and then avers that they were worth other twenty pounds; and so on in three or four different shapes; and at last concludes with declaring, that the defendant had refused to fulfil any of these agreements, whereby he is endamaged to such a value. And if he prove the case laid in any one of his counts, he shall recover the proportionable damages.

At the end of the declaration are added also the plaintiff's common pledges of prosecution, John Doe and Richard Roe, which are mere names of form. If the plaintiff neglect to deliver a declaration for two terms after the defendant appears, or be guilty of other delays or defaults against the rules of law in any subsequent stage of the action, he is adjudged not to follow or pursue his remedy as he ought to do, and thereupon a *nonsuit* or *non-prosequitur*, is entered, and he is said to be *non-pros'd*.

A *retraxit* differs from a nonsuit, in that the one is negative, and the other positive: the nonsuit is a mere default and neglect of the plaintiff, and therefore he is allowed to begin his suit again, upon payment of costs; but a *retraxit* is an open and voluntary renunciation of his suit in court, and by this he for ever loses his action.

A *discontinuance* is somewhat similar to a nonsuit; for when a plaintiff leaves a chasm in the proceedings of his cause, as by not continuing the process regularly from day to day, and time to time, as he ought to do, the suit is discontinued, and the defendant is no longer bound to attend; but the plaintiff must begin again, by suing out a new original, usually paying costs to the defendant.

When the plaintiff hath stated his case in the declaration, it is incumbent on the defendant within a reasonable time to make his defence, and to put in a plea; else the plaintiff will at once recover judgment by *default*.

Before defence is made at all, *cognizance* of the suit must be claimed or demanded; and, after defence made, the defendant must put in his plea. But, before he defends, if the suit be commenced by *capias* or *latitat*, without any special original, he is

entitled to demand one *imparlance*; and may, before he pleads, have more time granted by consent of the court, to see if he can end the matter amicably, without farther suit, by talking with the plaintiff.

PLEAS.

When these proceedings are over, the defendant must then put in his excuse or plea. Pleas are of two sorts; dilatory pleas, and pleas to the action. Dilatory pleas are such as tend merely to delay or put off the suit, by questioning the propriety of the remedy, rather than by denying the injury: pleas to the action are such as dispute the very cause of suit. The former cannot be pleaded after a general *imparlance*, which is an acknowledgment of the propriety of the action.

Dilatory pleas are—1. To the *jurisdiction* of the court; alleging, that it ought not to hold plea of this injury, it arising in Wales or beyond sea; or because the land in question is of an ancient demesne, and ought only to be demanded in the lord's court, &c. 2. To the *disability* of the plaintiff; by reason whereof he is incapable to commence or continue the suit; as, that he is an alien, enemy outlawed, excommunicated, attainted of treason or felony, under a *præmunire*, not in *rerum naturâ* (being only a fictitious person), an infant, a feme covert, or a monk professed. 3. In *abatement*: which abatement is either of the writ, or the count, for some defect in one of them; as, by misnaming the defendant, which is called a *misnomer*; giving him a wrong addition, as *esquire* instead of *knight*; or other want of form in any material respect. Or, it may be, that the plaintiff is dead; and in actions merely personal, arising *ex delicto*, for wrongs actually done or committed by the defendant, as trespass, battery, and slander, the rule is, that *actio personalis moritur cum personâ*, and it never shall be revived either by or against the executors or other representatives.

By 4 & 5 Ann. c. 16. no dilatory plea is to be admitted without affidavit made of the truth thereof, or some probable matter shewn to the court to induce them to believe it true.

When these dilatory pleas are allowed, the cause is either dismissed from that jurisdiction, or the plaintiff is stayed till his disability be removed; or he is obliged to sue out a new writ, by leave from the court; or to amend and new-frame his declaration. But when they are overruled as frivolous, the defendant has judgment of *respondat ouster*, or to *answer over* in some better manner; it is then incumbent on him to plead.

Secondly, a *plea to the action*; that is, to answer to the merits of the complaint. This is done by confessing or denying it.

A confession of the whole complaint is not very usual; for then the defendant would probably end the matter sooner, or not plead at all, but suffer judgment to go by default. Yet sometimes, after tender and refusal of a debt, if the creditor harass his

debtor with an action, it then becomes necessary for the defendant to acknowledge the debt, and plead the tender, adding that he has always been ready and still is ready to discharge it; for a tender by the debtor, and refusal by the creditor, will in all cases discharge the costs, but not the debt itself, though in some particular cases the creditor will totally lose his money. But frequently the defendant confesses one part of the complaint, and traverses or denies the rest; in order to avoid the expence of carrying that part to a formal trial, which he has no ground to litigate.

A species of this sort of confession is the payment of money into court, which is for the most part necessary upon pleading a tender, and is itself a kind of tender to the plaintiff, by paying into the hands of the proper officer of the court as much as the defendant acknowledges to be due, together with the costs hitherto incurred, in order to prevent the expence of any farther proceedings. This may be done upon what is called a *motion*; which is an occasional application to the court by the parties, or their counsel, in order to obtain some rule or order of court, which becomes necessary in the progress of a cause, and is usually grounded upon an affidavit, being a voluntary oath before some judge or officer of the court, to evince the truth of certain facts upon which the motion is grounded; though no such affidavit is necessary for payment of money into court.

If, after the money is paid in, the plaintiff proceed in his suit, it is at his own peril; for if he do not prove more due than is so paid into court, he shall be nonsuited, and pay the defendant's costs; but he shall still have the money so paid in, for that the defendant has acknowledged to be his due. To this head may also be referred the practice of what is called a *set-off*; whereby the defendant acknowledges the justice of the plaintiff's demand on the one hand, but on the other sets up a demand of his own, to counterbalance that of the plaintiff, either in the whole or in part; as, if the plaintiff sue for ten pounds due on a note of hand, the defendant may set off nine pounds due to himself for merchandise sold to the plaintiff; and in case he plead such set-off, must pay the remaining balance into court.

Pleas that totally deny the cause of complaint, are either the general issue, or a special plea in bar.

The *general issue*, or general plea, is what traverses, thwarts, and denies at once the whole declaration, without offering any special matter whereby to evade it. As in trespass, either *vi et armis*, or on the case, not guilty; in debt upon contract, he owes nothing; in debt on bond, it is not his deed; on an *assumpsit*, he made no such promise; or in real actions, no wrong done, no disseisin. And in writ of right, the *mise* or issue is, that the tenant has more right to hold than the demandant has to demand. These pleas are called the general issue; by which is meant a fact affirmed on one side, and denied on the other.

Special pleas are various, according to the circumstances of the defendant's case. As, in real actions, a general release or a fine, both of which may destroy and bar the plaintiff's title. Or, in personal actions, an accord, arbitration, conditions performed, non-age of the defendant, or some other fact which precludes the plaintiff from his action.

A *justification* is likewise a special plea in bar; as, in actions of assault and battery, that it was the plaintiff's own original assault; in trespass, that the defendant did the thing complained of in right of some office which warranted him so to do; or, in an action of slander, that the plaintiff is really as bad a man as the defendant said he was.

STATUTE OF LIMITATIONS.

Also, a man may plead the Statute of Limitation in bar. This, by the 32 Hen. VIII. c. 2. in a writ of right, is *sixty* years; in assizes, writs of entry, or other possessory actions real, of the seisin of one's ancestors in lands, and either of their seisin or one's own in rents, suits, and services, *fifty* years; and in actions real, for lands, grounded upon one's own seisin or possession, such possession must have been within *thirty* years. By the 1 Mar. st. 2. c. 5. this limitation does not extend to any suit for advowsons. But by the 21 Jac. I. c. 2. a time of limitation was extended to the case of the king, viz. *sixty* years precedent to 19 Feb. 1623; but this becoming ineffectual by efflux of time, the same date of limitation was fixed by the 9 Geo. III. c. 16. to commence, and be reckoned backwards, from the time of bringing any suit, or other process, to recover the thing in question; so that a possession for *sixty* years is now a bar even against the prerogative.

By another statute, 21 Jac. I. c. 16. *twenty* years is the time of limitation in any writ of formedon; and, by a consequence, *twenty* years is also the limitation in every act of ejectment: for no ejectment can be brought, unless where the lessor of the plaintiff is entitled to enter on the lands; and by the 21 Jac. I. c. 26. no entry can be made by any one, unless within twenty years after his right shall accrue.

Also, all actions of trespass, or otherwise, detinue, trover, replevin, account and case (except upon account between merchants), debt on simple contract, or for arrears of rent, are limited by the statute last-mentioned to *six* years after the cause of action commenced: and actions of assault, menace, battery, mayhem, and imprisonment, must be brought within *four* years, and actions for words within *two* years, after the injury committed.

And by the 31 Eliz. c. 5. all suits, indictments, and informations, upon any penal statutes, where any forfeiture is to the crown alone, shall be sued within *two* years; and where the forfeiture is to a subject, or to the crown and a subject, within *one* year after the offence committed, unless where any other time

is specially limited by the statute. Lastly, by the 10 W. III. c. 14. no writ of error, *scire facias*, or other suit, shall be brought to reverse any judgment, fine, or recovery, for error, unless it be prosecuted within *twenty* years.* If therefore, in any suit, the cause of action happened earlier than the period expressly limited by law, the defendant may plead the statute of limitation in bar; as, upon an *assumpsit*, or promise to pay money to the plaintiff, the defendant may plead, he made no such promise within six years; which is an effectual bar to the action.

The statute of limitation makes an exception for all persons who shall be under age, *feme-coverts*, *non compos mentis*, in prison, or abroad, when the cause of action accrues; and the limitations of the statute shall only commence from the time when their respective impediments or disabilities were removed. But if one only of a number of partners live abroad, they must bring their action within six years after the cause of it accrued. And where a partner has been guilty of any fraud in his dealings or accounts, the courts of law and equity have determined that he shall only protect himself by the Statute of Limitations from the time his fraud is discovered.

Any acknowledgment of the existence of the debt, however slight, will take it out of the statute, and the limitation will then run from that time: and where an expression is ambiguous, it shall be left to the consideration of the jury, whether it amounts, or not, to such acknowledgment. Where there are two or more drawers of a joint and several promissory note, the acknowledgment of any one may be given in evidence in a separate action against another, and will defeat the effect of the statute.

An *estoppel* is likewise a special plea in bar; which happens where a man hath done some act, or executed some deed, which estops or precludes him from averring any thing to the contrary. As if a tenant for years (who hath no freehold) levy a fine to another person; though this is void as to strangers, yet it shall work as an estoppel to the cognizor; for if he afterwards bring an action to recover these lands, and his fine is pleaded against him, he shall thereby be estopped from saying that he had no freehold at the time, and therefore was incapable of levying it.

Special pleas are usually in the affirmative, sometimes in the negative; but they always advance some new fact not mentioned in the declaration; and then they must be averred to be true in the common form, "And this he is ready to verify."

When the plea of the defendant is thus put in, if it do not amount to an issue, or total contradiction of the declaration, but only evade it, the plaintiff may plead again, and *reply* to the

* No statute has fixed any limitation to a bond or specialty: but where no interest has been paid upon a bond, and no demand proved thereon for twenty years, the judges recommend it to the jury to presume that it is discharged, and to find a verdict for the defendant. 2 T.R. 270. Lord Ellenborough has declared, that after a lapse of twenty years, a bond will be presumed to be satisfied; but there must either be a lapse of twenty years, or a less time coupled with some circumstance to strengthen the presumption. *Camp. N.P.* 29.

defendant's plea: either traversing it, that is, totally denying it; as if, on an action of debt upon bond, the defendant pleads, that he paid the money when due; here the plaintiff in his *replication* may totally traverse the plea, by denying that the defendant paid it; or, he may allege new matter in contradiction to the defendant's plea; as, when the defendant pleads *no award made*, the plaintiff may reply, and set forth an actual award, and assign a breach; or, the replication may confess and avoid the plea, by some new matter or distinction, consistent with the plaintiff's former declaration.

To the replication the defendant may rejoin, or put in an answer called a *rejoinder*. The plaintiff may answer the rejoinder by a *sur-rejoinder*; upon which the defendant may *rebut*; and the plaintiff may answer him by a *sur-rebutter*.

In any stage of the pleadings, when either side advances or affirms any new matter, he usually avers it to be true, "And this he is ready to verify." On the other hand, when either side traverses or denies the facts pleaded by his antagonist, he usually tenders an issue, as it is called; the language of which is different, according to the party by whom the issue is tendered. For if the traverse or denial come from the defendant, the issue is tendered in this manner, "And of this he puts himself upon the country," thereby submitting himself to the judgment of his peers: but if the traverse lie upon the plaintiff, he tenders the issue, or prays the judgment of his peers against the defendant in another form, thus, "And this he prays may be inquired of by the country."

But if either side (as, for instance, the defendant) plead a special negative plea, not traversing or denying any thing that was before alleged, but disclosing some new negative matter; as, where the suit is on a bond conditioned to perform an award, and the defendant pleads, negatively, that no award was made; he tenders no issue upon this plea, because it does not yet appear whether the fact will be disputed, the plaintiff not having yet asserted the existence of any award: but when the plaintiff replies, and sets forth an actual specific award, if then the defendant traverse the replication, and deny the making of any such award, he then, and not before, tenders an issue to the plaintiff. For when, in the course of pleading, they come to a point which is affirmed on one side, and denied on the other, they are then said to be at issue; all their debates being at last contracted into a single point, which must now be determined either in favour of the plaintiff or of the defendant.

CHAPTER XXI.

Of Issue, Demurrer, and Trial.

ISSUE, being the end of all the pleadings, is the fourth part or stage of an action, and is either upon matter of law, or matter of fact.

An *issue upon matter of law* is called a *demurrer*: and it confesses the facts to be true, as stated by the opposite party; but denies that, by the law arising upon those facts, any injury is done to the plaintiff, or that the defendant has made out a legitimate excuse: accordingly, the party which first demurs, rests or abides upon the point in question. As, if the matter of the plaintiff's complaint or declaration be insufficient in law, as by not assigning any sufficient trespass, then the defendant demurs to the declaration; if, on the other hand, the defendant's excuse or plea be invalid, the plaintiff may demur in law to the plea.

The form of such demurrer is by averring the declaration or plea, the replication or rejoinder, to be insufficient in law to maintain the action or the defence; and therefore praying judgment, for want of sufficient matter alleged.

An *issue of fact* is where the fact only, and not the law, is disputed. And when he that denies or traverses the fact pleaded by his antagonist has tendered the issue, thus, "And this he prays may be inquired of by the country;" or, "And of this he puts himself upon the country;" it may immediately be subjoined by the other party, "And the said A.B. doth the like." Which done, the issue is said to be joined.

During the whole of these proceedings, from the time of the defendant's appearance in obedience to the king's writ, it is necessary that both the parties be kept or *continued* in court from day to day, till the final determination of the suit; for the court can determine nothing, unless in the presence of both the parties. Therefore, in the course of pleading, if either party neglect to put in his declaration, plea, replication, rejoinder, and the like, within the times allotted by the standing rules of the court, the plaintiff, if the omission be his, is said to be *nonsuit*, or not to follow and pursue his complaint, and shall lose the benefit of his writ; or, if the negligence be on the side of the defendant, judgment may be had against him for such his default. And, after issue or demurrer joined, as well as in some of the previous stages of proceeding, a day is continually given and entered upon the record, for the parties to appear on from time to time. The giving of this day is called the *continuance*, because thereby the proceedings are continued without interruption from one adjournment to another. If these continuances be omitted, the cause is thereby

discontinued, and the defendant is discharged *sine die*, for this turn: for by his appearance in court he has obeyed the command of the king's writ; and, unless he be adjourned over to a day certain, he is no longer bound to attend upon that summons, but he must be warned afresh, and the whole must begin *de novo*.

Demurrers are determined by the judges, after hearing counsel on both sides; and to that end a demurrer-book is made up, containing all the proceedings at length, which are afterwards entered on record; and copies thereof, called *paper-books*, are delivered to the judges to peruse. The record is a history of the most material proceedings in the cause, entered on a parchment roll, and continued down to the present time; in which must be stated the original writ and summons, all the pleadings, the declaration, view or *oyer* prayed, the imparlances, plea, replication, rejoinder, continuances, and whatever farther proceedings have been had, all entered *verbatim* on the roll, and also the issue or demurrer, and joinder therein.

When the substance of the record is complete, and copies are delivered to the judges, the matter of law upon which the demurrer is grounded is, upon solemn argument, determined by the court, and not by any trial by jury; and judgment is thereupon accordingly given. As, in an action of trespass, if the defendant in his plea confess the fact, but justifies it *causâ venationis*, for that he was hunting; and to this the plaintiff demurs, that is, he admits the truth of his plea, but denies the justification to be legal; now, on arguing this demurrer, if the court be of opinion that a man may not justify trespass in hunting, they will give judgment for the plaintiff; if they think that he may, then judgment is given for the defendant. Thus is an issue in law, or demurrer, disposed of.

An *issue of fact* takes up more form and preparation to settle it; for here the truth of the matters alleged must be examined and established upon proper evidence by a jury: to which examination of facts the name of *trial* is usually confined.

THE JURY.

The trial by jury, observes Sir William Blackstone, hath been used time out of mind in this nation, and seems to have been coeval with the first civil government thereof. Some authors have endeavoured to trace its original up as high as the Britons themselves; but certain it is, that it was in use among the earliest Saxon colonies.

Trials by juries in civil causes are of two kinds; *extraordinary* and *ordinary*. The extraordinary we shall only briefly hint at, and confine ourselves to that which is more usual and ordinary.

The first species of extraordinary trial by jury is that of the *grand assize*. In which a writ *de magnâ assisâ eligendâ* is directed to the sheriff, to return four knights, who are to elect and choose twelve others to be joined with them; and these altogether

form the grand assize, or great jury, which is to try the matter of right, and must now consist of sixteen jurors.*

The next species of extraordinary juries is that of *attaint*; which is a process commenced against a former jury for bringing in a false verdict. This jury is to consist of twenty-four of the best men in the county, who are called the *grand jury* in the attaint, to distinguish them from the first or *petit* jury; and these are to hear and try the goodness of the former verdict.

The *ordinary* trial by jury is, where an issue is joined upon a matter of fact: upon which the court awards the writ of *venire facias* upon the roll or record, commanding the sheriff, "that he cause to come *here* on such a day, twelve free and lawful men, of the body of his county, by whom the truth of the matter may be better known, and who are not of kin to either of the parties, to recognize the truth of the issue between them." And such writ is accordingly issued to the sheriff.

When the general day of trial is fixed, the plaintiff or his attorney must bring down the record to the assizes, and enter it with the proper officer, in order to its being called on in course.

If it be not so entered, it cannot be tried: therefore it is in the plaintiff's breast to delay any trial by not carrying down the record; unless the defendant, being fearful of such neglect in the plaintiff, and willing to discharge himself from the action, will himself undertake to bring on the trial, giving proper notice to the plaintiff. Which proceeding is called the trial by *proviso*. This practice hath begun to be disused since the 14 Geo. II. c. 17. which enacts, that if, after issue joined, the cause is not carried down to be tried according to the course of the court, the plaintiff shall be esteemed to be nonsuited, and judgment shall be given for the defendant, as in case of nonsuit. In case the plaintiff intends to try the cause, he is bound to give the defendant, if he live within forty miles of London, eight days notice of trial; and if he live at a greater distance, then fourteen days notice, in order to prevent surprise: and if the plaintiff then change his mind, and do not countermand the notice six days before the trial, he shall be liable to pay costs to the defendant, for not proceeding to trial.† The defendant, however, or plaintiff, may, upon good cause shewn to the court above, as upon the absence or

* It seems not to be ascertained that any specific number above twelve is absolutely necessary to constitute the grand assize; but it is the usual course to swear upon it the four knights and twelve others. *Viner, Trial X. c.*

See the proceedings upon a writ of right before sixteen recognitors of the grand assize, in 2 *Wils.* 541.

† The statute only requires ten days notice; but at the sittings in London and Westminster, the former practice of fourteen days notice is still continued. But in all country causes ten days notice is sufficient; as, where the commission day is upon the fifteenth of any month, notice of trial must be given on or before the fifth. *Impey's Prac.* 305. If the defendant resides within forty miles of London, and the cause is to be tried at the sittings in London or Westminster, then two days notice of countermand before it is to be tried, is sufficient. 1 *Crep. Prac.* 220.

sickness of a material witness, obtain leave, upon motion, to defer the trial of the cause to the next assizes.

When the cause is called on, the record is handed to the judge, to peruse and observe the pleadings, and what issues the parties are to maintain and prove, while the jury is called and sworn.

The jurors contained in the pannel are either special or common jurors.

A *special jury* were originally introduced in trials at bar, when the causes were of too great nicety for the discussion of ordinary freeholders; or where the sheriff was suspected of partiality, though not upon such apparent cause as to warrant an exception to him. He is in such cases, upon motion in court, and a rule granted thereupon, to attend the prothonotary or other proper officer with the freeholders' book, and the officer is to take indifferently forty-eight of the principal freeholders in the presence of the attorneys on both sides, who are each of them to strike off twelve, and the remaining twenty-four are returned upon the pannel. Either party is entitled, upon motion, to have a special jury struck upon the trial of any issue, as well at the assizes as at bar, he paying the extraordinary expence, unless the judge will certify that the cause required such special jury.

A *common jury* is one returned by the sheriff according to the directions of the 3 Geo. II. c. 25. which appoints, that the sheriff or officers shall not return a separate pannel for every separate cause, as formerly; but one and the same pannel for every cause to be tried at the same assizes, containing not less than forty eight, nor more than seventy-two jurors; and that their names, being written on tickets, shall be put into a box or glass; and when each cause is called, twelve of these persons, whose names shall be first drawn out of the box shall be sworn upon the jury, unless absent, challenged, or excused; or unless a previous view of the messuages, lands, or place in question, shall have been thought necessary by the court, in which case six or more of the jurors returned, to be agreed on by the parties, or named by a judge or other proper officer of the court, shall be appointed by special writ of *habeas corpora* or *distringas*, to have the matters in question shewn to them by two persons named in the writ; and then such of the jury as have had the view, or so many of them as appear, shall be sworn on the inquest previous to any other jurors.

By the 1 & 2 Geo. IV. c. 46. the judges may direct the sheriff to summon not more than 144 jurors to attend the assizes on their respective circuits, and to serve indiscriminately on the civil and criminal trials; which jurors are to be divided into two sets, one of which is to attend at the beginning, and the other at the end of the assizes. And by section 2, the summonses are to express for the first or second set as the case may be, and also to specify at what time the attendance of the juror will be required.

As the jurors appear, when called, they shall be sworn, unless

challenged by either party. Challenges are of two sorts; challenges to the array, and challenges to the polls.

Challenges to the array are at once an exception to the whole pannel, in which the jury are arrayed or set in order by the sheriff in his return: and they may be made upon account of partiality or some default in the sheriff or his under-officer who arrayed the pannel. And though there be no personal objection against the sheriff, yet if he array the pannel at the nomination, or under the direction of either party, this is good cause of challenge to the array. The array by the ancient law may also be challenged, if an alien be party to the suit, and, upon a rule obtained by his motion to the court for a jury *de medietate linguæ*, such an one be not returned by the sheriff, pursuant to the 28 Edw. III. c. 13. enforced by the 8 Hen. VIII. c. 29. which enact, that where either party is an alien-born, the jury shall be one half denizens, and the other aliens (if so many be forthcoming in the place), for the more impartial trial. But where both parties are aliens, no partiality is to be presumed to one more than another; and therefore it is enacted, that where the issue is joined between two aliens (unless the plea be had before the mayor of the staple, and thereby subject to the restrictions of the 27 Edw. III. st. 2. c. 8.) the jury shall all be denizens.

Challenges to the polls (in capita) are exceptions to particular jurors.

But challenges to the polls of the jury (who are judges of fact) are reduced to four heads by Sir Edw. Coke; *propter honoris respectum*, *propter defectum*, *propter affectum*, and *propter delictum*.

Propter honoris respectum; as, if a lord in parliament be impannelled on a jury, he may be challenged by either party, or he may challenge himself.

Propter defectum; as, if a juryman be an alien-born, this is defect of birth; if he be a slave or bondman, this is defect of liberty. But the principal deficiency is the defect of estate sufficient to qualify him to be a juror. By the 4 & 5 W. & M. c. 24. it is raised to 10*l.* per annum in England, and 6*l.* in Wales, of freehold lands or copyhold. And by the 3 Geo. II. c. 25. any leaseholder for the term of five hundred years absolute, or for any term determinable upon life or lives, of the clear yearly value of 20*l.* per annum over and above the rent reserved, is qualified to serve upon juries.* When the jury is one moiety of the English tongue, and the other of any foreign one, no want of lands shall

* Upon account of the small number of freeholders in the county of Middlesex, and the frequent occasion for juries at Westminster in that county, it was enacted by the 4 Geo. II. c. 7. that a leaseholder for any number of years, if the improved annual value of his lease be 50*l.* above all ground-rents and other reservations, shall be liable to serve upon juries for that county. By the 3 Geo. II. c. 25. persons impannelled upon any jury within the city of London shall be householders, and possessed of some estate, either real or personal, of the value of 100*l.*

be cause of challenge to the alien ; for as he is incapable to hold any, this would totally defeat the privilege.

Jurors may be challenged *propter affectum*, for suspicion of bias or partiality. This may be either a *principal* challenge, or to the *favour*. A *principal* challenge is such where the cause assigned carries with it *primâ facie* evident marks of suspicion either of malice or favour ; as, that a juror is of kin to either party within the ninth degree ; that he has been arbitrator on either side ; that he has an interest in the cause ; that there is an action depending between him and the party ; that he has taken money for his verdict ; that he has formerly been a juror in the same cause ; that he is the party's master, servant, counsellor, steward, or attorney, or of the same society or corporation with him ; all these are principal causes of challenge, which, if true, cannot be overruled. Challenges *to the favour* are where the party hath no principal challenges, but objects only some probable circumstances of suspicion, as acquaintance, and the like, the validity of which must be left to the determination of *triors*, whose office it is to decide whether the juror be favourable or unfavourable. The *triors*, in case the first man called be challenged, are two indifferent persons named by the court ; and if they try one man, and find him indifferent, he shall be sworn ; and then he and the two *triors*, shall try the next ; and when another is found indifferent and sworn, the two *triors* shall be superseded, and the two first sworn on the jury shall try the rest.

Challenges *propter delictum* are for some crime or misdemeanor, that affects the juror's credit, and renders him infamous ; as for a conviction of treason, felony, perjury, or conspiracy ; or if for some infamous offence he hath received judgment of the pillory, tumbrel, or the like, or to be branded, whipped, or stigmatized ; or if he be outlawed or excommunicated, or have been attainted of false verdict, *præmunire*, or forgery.

A juror may himself be examined on oath, with regard to such causes of challenge as are not to his dishonour or discredit ; but not with regard to any crime, or any thing which tends to his disgrace or disadvantage.

Besides these challenges, there are other causes to be made use of by the jurors themselves, which are matter of exemption whereby their service is *excused* or *excluded* ; as sick and decrepit persons, persons not commorant in the county, and men above seventy years old, and infants under twenty-one.

This exemption is also extended by divers statutes, customs, and charters, to physicians and other medical persons, counsel, attorneys, officers of the courts, and the like ; all of whom, if impannelled, must shew their special exemption. Clergymen are also usually excused, out of favour and respect of their function ; but if they are seised of lands and tenements, they are in strictness liable to be impannelled in respect to their lay fees, unless they be in the service of the king or some bishop.

If, by means of challenges, or other cause, a sufficient number of unexceptionable jurors do not appear at the trial, either party may pray a *tales*. A *tales* is a supply of *such* men as are summoned upon the first pannel, in order to make up the deficiency. *Tales*, and the like, was used to be issued to the sheriff at common law, and must be still so done at a trial at bar, if the jurors make default. - But at the assizes, or *nisi prius*, the judge is empowered, at the prayer of either party, to award a *tales de circumstantibus*, of persons present in court, to be joined to the other jurors to try the cause; who are liable, however, to the same challenges as the principal jurors.

When a sufficient number of persons impannelled or talesmen appear, they are then separately sworn, well and truly to try the issue between the parties, and a true verdict to give according to the evidence.

The jury being sworn, the pleadings are opened to them by the counsel for the plaintiff, who briefly informs them what has been transacted in the court above, the parties, the nature of the action, the declaration, the plea, replication, and other proceedings, and lastly, upon what point the issue is joined. The nature of the case, and the evidence intended to be produced, are next laid before them; and when the evidence is gone through, the counsel for the defendant states his case, and supports it by evidence: and then the party which began is heard by way of reply.

EVIDENCE.

Evidence, in the trial by jury, is of two kinds; either that which is given in proof, or that which the jury may receive by their own private knowledge. The former, or *proofs* (to which in common speech the name of evidence is usually confined), are either written or parole, that is, by word of mouth.

Written proofs, or evidence, are records, and ancient deeds of thirty years standing, which prove themselves; but modern deeds, and other writings, must be attested and verified by parole evidence of witnesses. And the one general rule that runs through all the doctrine of trials is this, that the best evidence the nature of the case will admit of shall always be required, if possible to be had; but if not possible, then the best evidence that can be had shall be allowed. For if it be found that there is any better evidence existing than is produced, the very not producing it is a presumption that it would have detected some falsehood that at present is concealed.

Thus, in order to prove a lease for years, nothing else shall be admitted but the very deed of lease itself, if in being; but if that be positively proved to be burnt or destroyed (not relying on any loose negative, as that it cannot be found, or the like,) then an attested copy may be produced, or parole evidence given of its contents.

So, no evidence of a discourse with another will be admitted

but the man himself must be produced; yet in some cases (as in proof of any general custom, or matter of common tradition or repute) the court admits of *hearsay* evidence, or an account of what persons deceased have declared in their life-time: but such evidence will not be received of any particular facts.

Books of account, or shop books, are not allowed of themselves to be given in evidence for the owner; but a servant who made the entry, may have recourse to them to refresh his memory: and if such servant (who was accustomed to make those entries) be dead, and his hand be proved, the book may be read in evidence; for as tradesmen are often under the necessity of giving credit without any note or writing, this is therefore, when accompanied with such other collateral proof of fairness and regularity, the best evidence that can then be produced. But as this kind of evidence, even thus regulated, would be much too hard upon the buyer at any long distance of time, the 7 Jac. I. c. 12. confines this species of proof to such transactions as have happened within one year before the action brought; unless between merchant and merchant, in the usual intercourse of trade. For accounts of so recent a date, if erroneous, may more easily be unravelled and adjusted.

WITNESSES.

With regard to *parole* evidence, or *witnesses*; there is a process to bring them in by a writ of *subpœna*, which commands them, laying aside all pretences and excuses, to appear at the trial, on pain of 100*l.* to be forfeited to the king; to which the 5 Eliz. c. 9. has added a penalty of 10*l.* to the party aggrieved, and damages equivalent to the loss sustained by want of their evidence. But no witness, unless his reasonable expences be tendered him, is bound to appear at all; nor, if he appear, is he bound to give evidence till such charges are actually paid him; except he reside within the bills of mortality, and is summoned to give evidence within the same.

All witnesses, of whatever religion or country, that have the use of their reason, are to be received and examined, except such as are *infamous*, or such as are *interested* in the event of the cause. All others are *competent* witnesses; though the jury, from other circumstances, will judge of their *credibility*.

A Mahometan may be sworn upon the Alcoran, and a Gentoo according to the custom of India, and their evidence may be received even in criminal cases. But an Atheist, or a person who has no belief or notion of a God, or a future state of rewards or punishment, cannot be admitted as a witness.

Quakers, who refuse to take an oath under any form, by the 7 & 8 W. III. c. 34. are permitted, in judicial proceedings, to make a solemn affirmation; and if such affirmation, like an oath, be proved to be false, they are subject to the penalties of perjury.

But this does not extend to criminal causes; though their affirmations are received in penal actions, as for bribery. See *Atcheson v. Everitt, Cowp.* 312. where this subject is largely discussed.

Infamous persons are such as may be challenged as jurors *propter delictum*; and therefore cannot be admitted to give evidence.

Interested witnesses may be examined upon a *voir dire*, if suspected to be secretly concerned in the event; or their interest may be proved in court. Which last is the only method of supporting an objection to the former class: for no man is to be examined to prove his own infamy. But a witness may be examined with regard to his own infamy, if the confession of it do not subject him to any future punishment; as a witness may be asked, if he has not stood in the pillory for perjury.

And no counsel, attorney, or other person, entrusted with the secrets of the cause by the party himself, can be compelled to give evidence of such conversation or matters of privacy as came to his knowledge by virtue of such trust and confidence: but he may be examined as to mere matters of fact, as the execution of a deed, or the like, which might have come to his knowledge without being interested in the cause.

By the 46 Geo. III. c. 37. a witness cannot refuse to answer a question relevant to the matter in dispute, the answering of which has no tendency to accuse himself, or to expose him to penalty or forfeiture, by reason only that the answer to such question may establish or tend to establish that he owes a debt, or is subject to a civil suit.

One witness (if credible) is sufficient evidence to a jury of any single facts; though the concurrence of two or more corroborates the proof. Yet the law considers that there are many transactions to which only one person is privy; and therefore does not *always* demand the testimony of two.

Positive proof is always required, where from the nature of the case it appears it might possibly have been had. But, next to *positive* proof, *circumstantial* evidence, or the doctrine of *presumptions*, must take place: for when the fact itself cannot be demonstratively evinced, that which comes nearest to the proof of the fact is the proof of such circumstances which either *necessarily* or *usually* attend such facts; and these are called presumptions, which are only to be relied upon till the contrary be actually proved. *Violent* presumption is many times equal to full proof, for there those circumstances appear, which *necessarily* attend the fact. As if a landlord sue for rent due at Michaelmas 1754, and the tenant cannot prove the payment, but produces an acquittance for rent due at a subsequent time, in full of all demands, this is a violent presumption of his having paid the former rent, and is equivalent to full proof; for though the actual payment is not proved, yet the acquittance in full of all demands is proved,

which could not be without such payment; and it therefore induces so forcible a presumption, that no proof shall be admitted to the contrary.

Probable presumption, arising from such circumstances as usually attend the fact, hath also its due weight: as if, in a suit for rent due in 1754, the tenant prove the payment of the rent due in 1755, this will prevail to exonerate the tenant, unless it be clearly shewn that the rent of 1754 was retained for some special reason, or that there was some fraud or mistake: for otherwise it will be presumed to have been paid before that in 1755, as it is most usual to receive first the rents of longest standing.

The oath administered to the witness is not only that what he deposes shall be true, but that he shall also depose the *whole* truth; so that he is not to conceal any part of what he knows, whether interrogated particularly to that point, or not. And the evidence is to be given in open court, each party having liberty to except to its competency; which exceptions are publicly stated, and by the judge are openly and publicly allowed or disallowed.

And if, either in his directions or decisions, the judge mis-state the law, the counsel on either side may require him publicly to seal a *bill of exceptions*, stating the point wherein he is supposed to err: and this he is obliged to seal, or, on refusal, the party may have a compulsory writ against him, commanding him to seal it, if the fact alleged be truly stated. And if he return that the fact is untruly stated, when the case is otherwise, an action will lie against him for making a false return.

This bill of exceptions is in the nature of an appeal; examinable, not in the court out of which the record issues for the trial at *nisi prius*, but in the next immediate superior court, upon a writ of error, after judgment given in the court below. But a *demurrer* to evidence is determined by the court out of which the record is sent. This happens, where a record or other matter is produced in evidence, concerning the legal consequences of which there arises a doubt in law; in which case the adverse party may, if he please, demur to the whole evidence; which admits the truth of every fact that has been alleged, but denies the sufficiency of them all, in point of law, to maintain or overthrow the issue; which draws the question of law from the cognizance of the jury, to be decided by the court.

Such evidence as the jury may have in their own consciences, by their private knowledge of facts, has as much right to sway their judgment as the written or parole evidence which is delivered in court; and therefore if a juror know any thing of the matter in issue, he may be sworn as a witness, and give his evidence publicly in court.

When the evidence is gone through on both sides, the judge sums up the whole to the jury; who then withdraw from the bar to consider of their verdict, and they are to be kept without meat, drink, fire, or candle, unless by permission of the judge, till they are all unanimously agreed. And if they eat or drink at all, or

have any eatables about them, without consent of the court, and before verdict, it is finable; and if they do so at his charge for whom they afterwards find, it will set aside the verdict.

Also, if they speak with either of the parties, or their agents, after they have gone from the bar, or if they receive any fresh evidence in private, or if, to prevent disputes, they cast lots for whom they shall find, any of these circumstances will entirely vitiate the verdict.

And it has been held, that if the jurors do not agree in their verdict before the judges are about to leave the town, though they are not to be threatened or imprisoned, the judges are not bound to wait for them, but may carry them round the circuit, from town to town, until they shall have agreed in their verdict.

THE VERDICT.

A verdict, *vere dictum*, is either privy or public. A *privy verdict* is when the judge hath left or adjourned the court; and the jury being agreed, in order to be delivered from their confinement, obtain leave to give their verdict privily to the judge out of court; which privy verdict is of no force, unless afterwards confirmed by a public verdict given openly in the court, wherein the jury may, if they please, vary from their privy verdict. But the only effectual and legal verdict is the *public verdict*; in which they openly declare to have found the issue for the plaintiff, or for the defendant; and if for the plaintiff, they assess the damages also.

When a verdict will carry all the costs, and it is doubtful from the evidence for which party it will be given, it is a common practice for the judge to recommend, and the parties to consent, that a juror shall be withdrawn: and thus no verdict is given, and each party pays his own costs.

Where there is a doubt at the trial, whether the evidence produced by the plaintiff is sufficient to support the verdict given in his favour by the jury, the judge will give leave to apply to the court above to set aside the verdict, and to enter a nonsuit; but if such liberty be not reserved at the trial, the court above can only grant the defendant a new trial, if they think the plaintiff's evidence insufficient to support his case.

Sometimes, if there arise in the case any difficult matter of law, the jury, for the sake of better information, and to avoid the danger of having their verdict attained, will find a special verdict. And herein they state the naked facts, as they find them to be proved, and pray the advice of the court thereon; concluding conditionally, that if, upon the whole matter, the court shall be of opinion, that the plaintiff had cause of action, they then find for the plaintiff; if otherwise, then for the defendant. This is entered at length on the record, and afterwards argued and determined in the court at Westminster, from whence the issue came to be tried.

Another method of finding a species of special verdict is, when the jury find the verdict generally for the plaintiff, but subject nevertheless to the opinion of the judge or the court above, on a special case stated by the counsel on both sides with regard to a matter of law; which has this advantage over a special verdict, that it is attended with much less expence, and obtains a much speedier decision, the *postea* being stayed in the hands of the officer of *nisi prius* till the question is determined; and the verdict is then entered for the plaintiff or defendant, as the case may happen.

But, as nothing appears upon the record but the general verdict, the parties are precluded hereby from the benefit of a writ of error, if dissatisfied with the judgment of the court or judge upon the point of law. But in both these instances the jury may, if they think proper, take upon themselves to determine, at their own hazard, the complicated question of fact and law; and, without either special verdict or special case, may find a verdict absolutely either for the plaintiff or defendant.

CHAPTER XXII.

Proceedings after Trial—Judgment, Costs, Appeal, Execution.

If the verdict be found for either the plaintiff or defendant, or specially; or if the plaintiff make default, or be nonsuit; or whatever is done subsequent to the joining of issue, and awarding the trial; it is entered on record, and is called a *postea*. The substance of which is, that the said plaintiff and defendant appeared by their attorneys at the place of trial, and a jury being sworn, found such a verdict; or, that the plaintiff, after the jury sworn, made default, and did not prosecute his suit; or as the case may happen. This is added to the roll, which is returned to the court from which it was sent.

JUDGMENT.

Next follows the judgment of the court. Judgment may, however, for certain causes, be suspended, or finally arrested; for it cannot be entered till the next term after trial had, and that upon notice to the other party. So that, upon good cause shewn, a new trial may be had; or if, notwithstanding the issue of fact be regularly decided, it appears that the complaint was either not actionable, or not made with sufficient precision and accuracy, the party may supersede it, by arresting or staying the judgment.

Causes of *suspending* the judgment by granting a new trial, are at present wholly extrinsic, arising from matter foreign to or *dehors* the record. Of this sort are, want of notice of trial; or any flagrant misbehaviour of the party towards the jury, which may have influenced their verdict; or any gross misbehaviour of the jury among themselves; also, if it appear by the judge's report, certified by the court, that the jury have brought in a verdict without or contrary to evidence, so that he is reasonably dissatisfied therewith; or if they have given exorbitant damages; or if the judge himself have misdirected the jury, so that they found an unjustifiable verdict: for these, and other reasons, it is the practice of the courts to award a new trial.

A sufficient ground must be laid before the court, to satisfy them that it is necessary to have a new trial. If the matter be such as did not or could not appear to the judge who presided at *nisi prius*, it is disclosed to the court by *affidavit*: if it arise from what passed at the trial, it is taken from the judge's notes. Counsel are heard on both sides, and the court give their reasons at large why a new trial ought or ought not to be allowed.

A new trial will not be granted where the verdict is small, nor upon nice and formal objections, which do not go to the real merits. Nor in cases of strict right, where the rigorous exaction of extreme legal justice is hardly reconcilable to conscience. Nor is it granted where the scales of evidence hang nearly equal.

In granting a new trial, the court will lay the party applying under all such equitable terms as his antagonist shall desire and mutually offer to comply with; such as the discovery of some facts upon oath; the admission of others not intended to be litigated; the production of deeds, books, and papers; the examination of witnesses infirm, or going beyond sea; and the like. The motion must be made within the first four days of the next succeeding term; within which term it is usually heard and decided.

Arrests of judgment arise from intrinsic causes, appearing upon the face of the record. Of this kind are, first, where the declaration varies totally from the original writ; as, where the writ is in debt or detainee, and the plaintiff declares in an action on the case for an *assumpsit*. Also, where the verdict materially differs from the pleadings and issue thereon: as if, in an action for words, it be laid in the declaration that the defendant said, "the plaintiff *is* a bankrupt;" and the verdict finds specially that he said "the plaintiff *will be* a bankrupt. Or, thirdly, if the case laid in the declaration be not sufficient in point of law to found an action upon. And this is an invariable rule with regard to arrests of judgment upon matters of law, "that whatever is alleged in arrest of judgment must be such matter as would upon demurrer have been sufficient to overturn the action or plea." As if, on an action for slander in calling the plaintiff a Jew, the defendant deny the words, and issue is joined thereon; now if a verdict be found for the plaintiff, that the words were actually spoken, whereby the

fact is established, still the defendant may move in arrest of judgment, that to call a man a Jew is not actionable; and if the court be of that opinion, the judgment shall be arrested. But the rule will not hold *è converso*, "that every thing that may be alleged as cause of demurrer will be good in arrest of judgment; for if a declaration or plea omit to state some particular circumstance, without proving of which at the trial it is impossible to support the action or defence, this omission shall be aided by a verdict. As if, in an action of trespass, the declaration do not allege that the trespass was committed on any certain day; or if the defendant justify, by prescribing for a right of common for his cattle, and do not plead that his cattle were *levant et couchant* on the land; though either of these defects might be good cause to demur to the declaration or plea, yet if the adverse party omit to take advantage of such omission in due time, but take issue, and have a verdict against him, these exceptions cannot, after verdict, be moved in arrest of judgment.

If, by the misconduct or inadvertence of counsel, the issue be joined on a fact totally immaterial, or insufficient to determine the right, so that the court upon the finding cannot know for whom judgment ought to be given; as if, in an action on the case in *assumpsit* against an executor, he plead that he himself (instead of the testator) made no such promise; or if, in an action of debt on bond conditioned to pay money *on* or *before* a certain day, the defendant plead payment *on* the day (which issue, if found for the plaintiff would be inconclusive, as the money might have been paid *before*): in these cases the court will, after verdict, award a *repleader*, unless it appear from the whole record that nothing material can possibly be pleaded in any shape whatsoever, and then a *repleader* would be fruitless.

If judgment be not by some of these means arrested within the first four days of the next term, it is then to be entered on the roll or record.

Judgments are of four sorts:—First, Where the facts are confessed by the parties, and the law determined by the court; as in case of judgment upon *demurrer*. Secondly, Where the law is admitted by the parties, and the facts disputed; as in case of judgment on a *verdict*. Thirdly, Where both the fact and the law arising thereon are admitted by the defendant; which is the case of judgments by *confession* or *default*. And lastly, Where the plaintiff is convinced that either fact or law, or both, are insufficient to support his action, and therefore abandons or withdraws his prosecution; which is the case in judgments upon a *nonsuit*. All these species of judgment are either interlocutory or final.

Interlocutory judgments are, such as are given in the middle of a cause, upon some plea, proceeding, or default, which is only intermediate, and does not finally determine or complete the suit.

But the interlocutory judgments most usually spoken of are

those incomplete judgments, whereby the right of the plaintiff is established, but the *quantum* of damages sustained by him is not ascertained; which is a matter that cannot be done without the intervention of a jury. This can only happen where the plaintiff recovers; for when judgment is given for the defendant, it is always complete as well as final. And this happens, in the first place, where the defendant suffers judgment to go against him by default; as if he put in no plea at all to the plaintiff's declaration: by confession, where he acknowledges the plaintiff's demand to be just; or by *non sum informatus*, when the defendant's attorney declares he has no instructions to say any thing in answer to the plaintiff, or in defence of his client; which is a species of judgment by default. If these, or any of them, happen in an action where the specific thing sued for is recovered, as in actions of debt for a sum certain, the judgment is absolutely complete. And therefore it is usual, in order to strengthen a creditor's security, for the debtor to execute a warrant of attorney to some attorney named by the creditor, empowering him to confess a judgment by either of the ways just now mentioned in an action of debt to be brought by the creditor against the debtor for the specific sum due; which judgment, when confessed, is absolutely complete and binding: provided the same (as is also required in all other judgments) be regularly *doctquetted*, that is, abstracted and entered in a book, according to the directions of the 4 & 5 W. & M. c. 20. But where damages are to be recovered, a jury must be called in to assess them, unless the defendant, to save charges, will confess the whole damages laid in the declaration: otherwise the entry of the judgment is, "that the plaintiff ought to recover his damages (indefinitely); but because the court knows not what damages the said plaintiff hath sustained, therefore the sheriff is commanded, that by the oaths of twelve honest and lawful men he inquire into the said damages, and return such inquisition into court." This process is called a *writ of inquiry*; in the execution of which the sheriff sits as judge, and tries by a jury, subject to nearly the same law and conditions as the trial by jury at *nisi prius*, what damages the plaintiff has really sustained; and when their verdict is given, which must assess *some* damages, the sheriff returns the inquisition, which is entered upon the roll, in manner of a *postea*; and thereupon it is considered, that the plaintiff do recover the exact sum of the damages so assessed. In like manner, when a demurrer is determined for the plaintiff, upon an action wherein damages are recovered, the judgment is also incomplete without the aid of a writ of inquiry.

Final judgments are such as at once put an end to the action, by declaring that the plaintiff has either entitled himself, or has not, to recover the remedy he sues for. In which case, if the judgment be for the plaintiff, it is also considered that the defendant be either amerced, for his wilful delay of justice in not

immediately obeying the king's writ by rendering the plaintiff his due; or be taken up, till he pay a fine to the king for the public misdemeanor which is coupled with the private injury; in all cases of force, of falsehood in denying his own deed, or unjustly claiming property in replevin, or of contempt by disobeying the command of the king's writ or the express prohibition of any statute. But now, in case of trespass, ejectment, assault, and false imprisonment, it is provided that no writ of *capias* shall issue for this fine, nor any fine be paid, but the plaintiff shall pay 6s. 8d. to the proper officer, and be allowed it against the defendant among his other costs. But if judgment be given for the defendant, then in case of fraud or deceit to the court, or malicious or vexatious suits, the plaintiff may also be fined; but in most cases it is only considered, that he and his pledges of prosecuting be (nominally) amerced for his false claim, and that the defendant may go thereof without a day, that is, without any further continuance or adjournment.

COSTS.

With regard to costs, the king (and any person suing to his use) shall neither pay nor receive costs. In two other cases an exemption also lies from paying costs: executors and administrators, when suing in right of the deceased, shall pay none; and paupers, who will swear themselves not worth five pounds, are to have original writs and subpoenas gratis, and counsel and attorney assigned them without fee; and are excused from paying costs, when plaintiffs, but shall suffer other punishment at the discretion of the judges. To prevent also trifling and malicious actions for words, for assault and battery, and for trespass, it is enacted [by the 43 Eliz. c. 6. and 22 & 23 Car. II. c. 9. § 136. that where the jury who try any of these actions shall give less damages than 40s. the plaintiff shall be allowed no more costs than damages, unless the judge shall certify under his hand, on the back of the record, that an actual battery (and not an assault only) was proved, or that in a trespass the freehold or title of the land came chiefly in question. Also by the 4 & 5 W. & M. c. 23. and the 8 & 9 W. III. c. 11: if the trespass were committed in hunting or sporting by an inferior tradesman, or if it appear to be wilfully and maliciously committed, the plaintiff shall have full costs, though his damages as assessed by the jury amount to less than 40s. (See page 62.)

APPEALS.

Appeals are of different kinds.

A *writ of attaint*; which lies to inquire whether a jury of twelve men gave a false verdict. But the practice of setting aside verdicts upon motion, and granting new trials, has superseded the use of attainments.

The *writ of deccit*, or action on the case in the nature of it, may be brought in the Court of Common Pleas, to reverse a judgment there had by fraud or collusion in a real action.

But the principal method of redress for erroneous judgments is by *writ of error* to some superior court of appeal.

A writ of error lies for some supposed mistake in the proceedings of a court of record, upon matter of *law* arising upon the face of the proceedings, so that no evidence is required to substantiate or support it.

If a writ of error be brought to reverse any judgment of an inferior court of record, where the damages are less than ten pounds; or if it be brought to reverse the judgment of any superior court; he that brings the writ, or that is plaintiff in error, must find substantial pledges of prosecution or bail.

A writ of error lies from the inferior courts into the King's Bench, and then from the King's Bench to the House of Lords. From proceedings on the law side of the Exchequer a writ of error lies into the Court of Exchequer Chamber, and from thence to the House of Peers. From proceedings in the King's Bench, in debt, detinue, covenant, account, case, ejectment, or trespass, originally begun therein by bill, (except where the king is party) it lies to the Exchequer Chamber, and from thence to the House of Lords.

But where the proceedings in the King's Bench do not first commence therein by bill, but by original writ sued out of Chancery, the writ of error then lies, without any intermediate stage of appeal, directly to the House of Lords.

EXECUTION.

If the plaintiff recover in an action real or mixed, whereby the seisin or possession of land is awarded to him, the writ of execution is a writ of seisin of a freehold, or a writ of possession of a chattel interest. These are writs directed to the sheriff of the county, commanding him to give actual possession to the plaintiff of the land; in the execution of which the sheriff may justify breaking open doors, if the possession be not quietly delivered. But if it be peaceably yielded up, the delivery of a twig, a turf, or the ring of the door, in the name of seisin, is sufficient execution of the writ.

Upon a presentation to a benefice recovered in a *quare impedit*, or assize of *darrein presentment*, the execution is by a writ *de clerico admittendo*; directed, not to the sheriff, but to the bishop or archbishop, and requiring him to admit and institute the clerk of the plaintiff.

Upon an assize of nuisance, where one part of the judgment is *quod nocumentum amoveatur*, a writ goes to the sheriff to abate it at the charge of the party; which likewise issues even in case of an indictment.

Upon a replevin, the writ of execution is the writ *de returno habendo*; and if the distress be eloigned, the defendant shall have a *capias in withernam*: but on the plaintiff's tendering the damages, and submitting to a fine, the process *in withernam* shall be stayed.

In detinue, after judgment, the plaintiff shall have a *distringas*, to compel the defendant to deliver the goods, by repeated distresses of his chattels; or else a *scire facias* against any third person in whose hands they may happen to be, to shew cause why they should not be delivered: and if the defendant still continue obstinate, then

(if the judgment have been by default or on demurrer) the sheriff shall summon an inquest to ascertain the value of the goods, and the plaintiff's damages, which (being either so assessed, or by the verdict in case of an issue) shall be levied on the person or goods of the defendant.

Executions in actions where money only is recovered, as a debt or damages, and not any specific chattel, are of five sorts; either against the body of the defendant; or against his goods and chattels; or against his goods, and the profits of his lands; or against his goods and the possession of his lands; or against all three, his body, lands, and goods.

The first of these species of execution is by writ of *capias ad satisfaciendum*; which lies to compel an appearance at the beginning of a suit. And this cannot be sued out against any but such as were liable to be taken upon the former *capias*. It doth not lie against any privileged persons, peers, or members of parliament, nor against executors and administrators, nor against such other persons as could not be originally held to bail.

If an action be brought against a husband and wife for the debt of the wife when sole, and the plaintiff recover judgment, the *capias* shall issue to take both the husband and wife in execution; but if the action were originally brought against herself when sole, and pending the suit she marry, the *capias* shall be awarded against her only. Yet, if judgment be recovered against a husband and wife for the contract, nay, even for the personal misbehaviour of the wife during her coverture, the *capias* shall issue against the husband only.

Where both husband and wife are arrested upon mesne process, the court will discharge the wife, upon motion and proof of the marriage, on common bail, unless it be for a debt contracted since her marriage, and she have represented herself to be single; in which case the court will not assist her, but will leave her to plead her coverture. And where, after judgment against husband and wife, they are both rendered in discharge of bail, she shall be discharged; for they are then in the same situation as if bail had never been put in for them.

The writ of *capias ad satisfaciendum* is an execution of the highest nature. By the 1 Jac. I. c. 24. if the defendant die, while charged in execution upon this writ, the plaintiff may, after his death, sue out a new execution against his lands, goods, or chattels. This writ is directed to the sheriff, commanding him to take the body of the defendant, and have him at Westminster on the day therein named, to make the plaintiff satisfaction for his demand. And if he do not then make satisfaction, he must remain in custody till he does.

When a defendant is once in custody upon this process, and is afterwards seen at large, it is an *escape*; and the plaintiff may have an action against the sheriff for his whole debt. Escapes are either voluntary or negligent. Voluntary are such as are by the express consent of the keeper; after which he can never retake his prisoner again (though the plaintiff may retake him at any time)

but the sheriff must answer for the debt. Negligent escapes are his, where the prisoner escapes without the keeper's knowledge or consent; and then upon fresh pursuit the defendant may be retaken, and the sheriff shall be excused, if he have him again before an action brought against him for the escape. A rescue of a prisoner in execution, either going to gaol, or in gaol, or a breach of prison, will not excuse the sheriff from being guilty of and answering for the escape.

If a *capias ad satisfaciendum* be sued out, and a *non est inventus* returned thereon, the plaintiff may sue out a process of *scire facias* against the bail, commanding them to shew cause why he (the plaintiff) should not have execution against them for his debt and damages; and on such writ, if they shew no sufficient cause, or the defendant do not surrender himself on the day of the return, or of shewing cause, the plaintiff may have judgment against the bail.

The next species of execution is against the goods and chattels of the defendant, and is called a writ of *fiery facias*. This lies as well against privileged persons, peers, &c. as other common persons, and against executors and administrators, with regard to the goods of the deceased. The sheriff cannot break open any outer door to execute either this or the former writ, but must enter peaceably, and may then break open any inner door, in order to take the goods. And he may sell the goods and chattels (even an estate for years, which is a chattel real) of the defendant, till he has raised enough to satisfy the judgment and costs; first paying the landlord of the premises, upon which the goods are found, the arrears of rent then due, not exceeding one year's rent in the whole. But the landlord must make a demand of the rent due before the goods are removed. If the sheriff, in levying an execution, have any doubt whether the goods are the property of the defendant, he may summon a jury.

A third species of execution is by writ of *levari facias*; which affects a man's goods and the profits of his lands. Little use is now made of this writ.

The fourth species is by the writ of *elegit*; which is a judicial writ given either upon a judgment for a debt or damages, or upon the forfeiture of a recognizance taken in the king's court. By this writ the defendant's goods and chattels are not sold, but only appraised; and all of them (except oxen and beasts of the plough) are delivered to the plaintiff at such reasonable appraisement and price in part of satisfaction of his debt. If the goods be not sufficient, then the moiety or one half of his freehold lands, which he had at the time of the judgment given, whether held in his own name, or by any other in trust for him, are also to be delivered to the plaintiff, to hold till out of the rent and profits thereof the debt be levied, or till the defendant's interest be expired, as till the death of the defendant, if he be tenant for life or in tail. But, by statute, only one half is subject to execution; the remainder being left for the landlord to distrain.

This execution or seizing of lands by *elegit*, is of so high a nature, that after it the body of the defendant cannot be taken;

but if execution can only be had of the goods, because there are no lands, and such goods are not sufficient to pay the debt, a *capias ad satisfaciendum* may then be had after the *elegit*; for such *elegit* is in this case no more in effect than a *faci facias*. So that body and goods may be taken in execution, or land and goods; but not body and land too, upon any judgment between subject and subject in the course of the common law. But,

Upon some prosecutions given by statute; as in recognizances or debts acknowledged, on statutes merchant or statutes staple (pursuant to the 13 Edw. I. *de mercatoribus*, and 27 Edw. III. c. 9.) upon forfeiture of these, the body, lands, and goods, may all be taken at once in execution, to compel the payment of the debt. The process hereon is usually called an *extent*, because the sheriff is to cause the lands, &c. to be appraised to their full extended value, before he delivers them to the plaintiff, that it may be certainly known how soon the debt will be satisfied.

And by the 33 Hen. VIII. c. 39. all obligations made to the king shall have the same force, and of consequence the same remedy to recover them, as a statute staple. And his debt shall, in suing out execution, be preferred to that of every other creditor who hath not obtained judgment before the king commenced his suit. The king's judgment also affects all lands which the king's debtor hath at or after the time of contracting his debt, or which any of his officers mentioned in the 13 Eliz. c. 4. hath at or after the time of his entering on the office; so that if such officer of the crown aliene for a valuable consideration, the land shall be liable to the king's debt, even in the hands of a *bonâ fide* purchaser; though the debt due to the king was contracted by the vendor many years after the alienation. But, between subject and subject, the Statute of Frauds says, the judgment shall not bind the land in the hands of a *bonâ fide* purchaser, but only from the day of actually signing the same, which is directed to be punctually entered on the record; nor shall the writ of execution bind the goods in the hands of a stranger or a purchaser, but only from the actual delivery of the writ to the sheriff or other officer, who is therefore ordered to indorse on the back of it the day of his receiving the same.

By 57 Geo. III. c. 177, to regulate *extents in aid*, it is enacted, that, upon the issuing of every extent in aid, the court shall cause the amount of the debt due to be stated in the fiat; and in all cases in which the debt found due to the debtor shall be equal to or exceed the debt, the amount of the debt so stated shall be indorsed upon the writ, which shall be the authority to the sheriff, in making his levy; and in all cases in which the debt found due to the debtor shall be of less amount than the debt stated in the fiat, the amount of such debt shall be indorsed upon the writ, and shall be authority to the sheriff, in making his levy; and the money levied under every such extent in aid shall be paid over to his majesty's use, towards satisfaction of the debts due to his majesty. § 1.

In every case in which the sum produced by the sale of any lands, goods, or chattels, or by the receipt of any money by any sheriff, shall be more than sufficient to satisfy the amount of the sum in-

indorsed upon the writ, such overplus shall be paid into the exchequer, together with the amount indorsed upon the writ; and the court shall, upon any summary application, make such order for the return, disposal, or distribution of such surplus, or any part thereof, as shall appear to be proper. § 2.

Nothing in this act shall affect, either at law or in equity, any demand of the person to whom such debt shall have been due, when seized into his majesty's hands, or his assignees, executors, or administrators, as to the remaining part of such debt, or any other debt seized or sued for under such extent, but still remaining unpaid either in the whole or in part; but it shall be lawful to demand, sue for, and recover the remainder, or any other debts, by the like process as if no such extent in aid had issued. § 3.

No person who shall be indebted to his majesty by simple contract only; nor who shall be indebted to his majesty by bond, for answering any particular duties, or sums of money which shall become due to his majesty; nor any sub-distributor of stamps, who shall have given bond; nor any person who shall have given bond to his majesty, either jointly or separately, as a surety only for some other debtor, until such surety shall have made proof of a demand having been made upon him on behalf of his majesty, in consequence of the nonperformance of the conditions of the bond by the principal, and then only to the amount of the said demand; shall sue out any extent in aid, for the recovery of any debt due to such persons, or sub-distributor of stamps, or surety, as aforesaid: but nothing herein shall extend to prevent any persons who shall become debtors to his majesty by simple contract only, by the collection of any money arising out of his majesty's revenue, from applying for and suing out any commission, or extents in aid, in case one or more such persons shall be bound to his majesty by bond or specialty of record in the Exchequer, for answering for the particular duties or sums which shall constitute the debt that may be then so due from such persons. § 4.

No extent in aid shall be issued on any bond given by any persons as sureties for paying any duties which may become due to his majesty from any society, incorporated or otherwise, carrying on the business of insurance against any risk of fire, or any other kind. § 5.

Any persons imprisoned under extents in aid may apply to the barons of the Exchequer, or to any baron in vacation, for discharge, giving one month's previous notice in writing to the person to whom they owed the debt, stating the ground of such application, and an enumeration of all the property, debts, and effects whatsoever in their own possession, or in the possession of any other person for their use; and the court, or baron, may order such persons to be brought before them to be examined upon oath: and if such persons shall make a full disclosure of all their property, or it shall otherwise appear reasonable that they should be no longer imprisoned, the court or baron may order a writ of *superedeas quoad corpus* to be issued for their liberation; but no such liberation shall be deemed to satisfy such extent in aid, except as to such imprisonment, or the debt seized by virtue thereof. § 6.

All writs of execution must be sued out within a year and a day after the judgment is entered. Yet, however, the court will grant a writ of *scire facias* for the defendant to shew cause why the judgment should not be revived, to which he may plead such matter as he has to allege; or the plaintiff may still bring an action of debt, founded on this dormant judgment.

CHAPTER XXIII.

Process of a Suit in the Court of Chancery.

THE first commencement in a suit of Chancery is by preferring a bill to the lord chancellor in the style of a petition, "Humbly complaining, sheweth to your lordship, your orator, A.B. that, &c. in tender consideration whereof, and for that your orator is wholly without remedy at the common law," relief is therefore prayed at the chancellor's hands, and also process of *subpœna* against the defendant to compel him to answer upon oath to all the matters charged in the bill. And if it be to quiet the possession of lands, to stay waste, or to stop proceedings at law, an *injunction* is also prayed in the nature of an *interdictum* by the civil law, commanding the defendant to cease.

This bill must call all necessary parties, however remotely concerned in interest, before the court, otherwise no decree can be made to bind them; and must be signed by counsel, as a certificate of its decency and propriety. For it must not contain matter either scandalous or impertinent; if it do, the defendant may refuse to answer it, till such scandal or impertinence is expunged; which is done upon an order to refer it to one of the officers of the court, called a master in chancery, of whom there are twelve, including the master of the rolls. The master is to examine the propriety of the bill; and if he report it scandalous or impertinent, such matter must be struck out, and the defendant shall have his costs, which ought of right to be paid by the counsel who signed the bill.

When the bill is filed in the office of the six clerks, if an injunction be prayed therein, it may be had at various stages of the cause, according to the circumstances of the case. If the bill be to stay execution upon an oppressive judgment, and the defendant do not put in his answer within the stated time allowed by the rules of the court, an injunction will issue of course; and when the answer comes in, the injunction can only be continued upon a sufficient ground appearing from the answer itself. But if an injunction be wanted to stay waste, or other injuries of an equally urgent nature, then, upon the filing of the bill, and a proper case supported by affidavits, the court will grant an injunction immediately, to continue till the defendant has put in his answer, and till the court shall make some further order concerning it; and when the answer comes in, whether it shall then be dissolved or

continued till the hearing of the cause, is determined by the court upon argument.

But, upon common bills, as soon as they are filed, process of *subpœna* is taken out; which is a writ commanding the defendant to appear and answer to the bill, on pain of 100*l*. But this is not all: for if the defendant, on service of the *subpœna*, do not appear within the time limited by the rules of the court, and plead, demur, or answer to the bill, he is then said to be in *contempt*; and the respective processes of contempt are in successive order awarded against him. The first is an *attachment*, which is a writ in the nature of a *capias*, directed to the sheriff, and commanding him to attach, or take up the defendant, and bring him into court.

If the sheriff return that the defendant *non est inventus*, then an *attachment with proclamations* issues; which, besides the ordinary form of attachment, directs the sheriff, that he cause public proclamations to be made throughout the county, to summon the defendant, upon his allegiance, personally to appear and answer.

If this be also returned with a *non est inventus*, and he still stands out in contempt, a *commission of rebellion* is awarded against him, for not obeying the king's proclamations, according to his allegiance; and four commissioners therein named, or any of them, are ordered to attach him, wheresoever he may be found in Great Britain, as a rebel and contemner of the king's laws and government, by refusing to attend his sovereign when required.

If, upon this commission of rebellion, a *non est inventus* is returned, the court then sends a serjeant-at-arms in quest of him; and if he elude the search of the serjeant also, then a *sequestration* issues to seize all his personal estates, and the profits of his real, and to detain them, subject to the order of the court. After an order for a sequestration issued, the plaintiff's bill is to be taken *pro confesso*, and a decree to be made accordingly. So that the sequestration does not seem to be in the nature of process to bring in the defendant, but only intended to enforce the performance of the decree.

If the defendant be taken upon any of this process, he is to be committed to the Fleet, or other prison, till he puts in his appearance or answer, or performs whatever else this process is issued to enforce, and also clears his contempts by paying the costs which the plaintiff has incurred thereby. For the same kind of process is issued out in all sorts of contempts, during the progress of the cause, if the parties in any point refuse or neglect to obey the order of the court.

The process against a body corporate is by *distringas*, to distrain them by their goods and chattels, rents and profits, till they shall obey the summons or directions of the court. And if a peer be a defendant, the lord chancellor sends a *letter missive* to him to request his appearance, together with a copy of the bill; and if he neglect to appear, then he may be served with a *subpœna*; and if he continue still in contempt, a sequestration issues out immediately against his lands and goods, without any of the mesue process of attachments, &c. which are directed only against

the person, and therefore cannot affect a lord of parliament. The same process issues against a member of the House of Commons, except only that the lord chancellor sends him no letter nisi.

The ordinary process before mentioned cannot be sued out till after service of the *subpoena*, for then the contempt begins; otherwise he is not presumed to have notice of the bill; and therefore, by absconding to avoid the *subpoena*, a defendant might have eluded justice, till the 5 Geo. II. c. 25. which enacts, that where the defendant cannot be found to be served with process of *subpoena*, and absconds to avoid being served therewith, a day shall be appointed him to appear to the bill of the plaintiff, which is to be inserted in the London Gazette, read in the parish-church where the defendant last lived, and fixed up at the Royal Exchange; and if the defendant do not appear upon that day, the bill shall be taken *pro confesso*.

But if the defendant appear regularly, and take a copy of the bill, he is next to *demur*, *plead*, or *answer*.

A *demurrer* in equity is nearly of the same nature as a demurrer in law; being an appeal to the judgment of the court, whether the defendant shall be bound to answer the plaintiff's bill; as, for want of sufficient matter of equity therein contained; or where the plaintiff, upon his own shewing, appears to have no right; or where the bill seeks the discovery of a thing which may cause a forfeiture of any kind, or may convict a man of any criminal misbehaviour. For any of these causes a defendant may demur to the bill; and if, on demurrer, the defendant prevail, the plaintiff's bill shall be dismissed; if the demurrer be overruled, the defendant is ordered to answer.

A *plea* may be either to the *jurisdiction*, shewing that the court has no cognizance of the cause; or to the *person*, shewing some disability in the plaintiff, as by outlawry, excommunication, and the like; or it is in *bar*, shewing some matter wherefore the plaintiff can demand no relief, as an act of parliament, a fine, a release, or a former decree. And the truth of this plea the defendant is bound to prove, if put upon it by the plaintiff. But as bills are often of a complicated nature, and contain various matters, a man may plead as to part, demur as to part, and answer to the residue. But no exceptions to formal *minutiae* in the pleadings will be here allowed; for the parties are at liberty, on the discovery of any errors in form, to amend them.

An *answer* is the most usual defence that is made to a plaintiff's bill. It is given in upon oath, or the honour of a peer or peeress; but where there are amicable defendants, their answer is usually taken without oath by consent of the plaintiff.

If the defendant live within twenty miles of London, he must be sworn before one of the masters; if farther off, there may be a commission to take his answer in the country, where the commissioners administer him the usual oath; and then the answer being sealed up, either one of the commissioners carries it up to the

court; or it is sent by a messenger, who swears he received it from one of the commissioners, and that the same has not been opened or altered since he received it.

An answer must be signed by counsel, and must either deny or confess all the material parts of the bill; or it may confess and avoid, that is, justify or palliate the facts. If one of these be not done, the answer may be excepted to for insufficiency, and the defendant be compelled to put in a more sufficient answer. A defendant cannot pray any thing in this his answer, but to be dismissed the court; if he have any relief to pray against the plaintiff, he must do it by an original bill of his own, which is called a *cross bill*.

After answer put in, the plaintiff, upon payment of costs, may amend his bill, either by adding new parties, or new matter, or both, upon the new lights given him by the defendant: and the defendant is obliged to answer afresh to such amended bill. But this must be before the plaintiff has replied to the defendant's answer, whereby the cause is at issue; for afterwards, if new matter arise, which did not exist before, he must set it forth by a *supplementary bill*.

There may be also a *bill of revivor*, when the suit is abated by the death of any of the parties, in order to set the proceedings again in motion, without which they remain at a stand.

And there is likewise a *bill of interpleader*; where a person who owes a debt or rent to one of the parties in a suit, but, till the determination of it, he knows not to which, desires that they may interplead, that he may be safe in the payment. In this last case it is usual to order the money to be paid into court, for the benefit of such of the parties to whom, upon hearing, the court shall decree it to be due. But this depends upon circumstances; and the plaintiff must also annex an *affidavit* to his bill, swearing that he does not collude with either of the parties.

If the plaintiff find sufficient matter confessed in the defendant's answer to ground a decree upon, he may proceed to the hearing of the cause upon bill and answer only. But in that case he must take the defendant's answer to be true in every point; otherwise the course is, for the plaintiff to reply generally to the answer, averring his bill to be true, certain, and sufficient, and the defendant's answer to be directly the reverse; which he is ready to prove, as the court shall award. Upon which the defendant rejoins, averring the like on his side; which is joining issue upon the facts in dispute. To prove which facts, is the next concern.

This is done by examination of witnesses, and taking their depositions in writing. And for that purpose interrogatories are framed, or questions in writing; which, and which only, are to be proposed to, and asked of, the witnesses in the cause. These interrogatories must be short and pertinent; not leading ones (as, "Did not you see this?" or, "Did not you hear that?" for if

they be such, the depositions taken thereon will be suppressed, and not suffered to be read.

For the purpose of examining witnesses in or near London, there is an examiner's office appointed; but for such as live in the country, a commission to examine witnesses is usually granted to four commissioners, two named of each side, or any three or two of them, to take the depositions there. And if the witnesses reside beyond sea, a commission may be had to examine them there upon their own oaths; and, if foreigners, upon the oaths of skilful interpreters.

The commissioners are sworn to take the examinations truly, and without partiality, and not to divulge them till published in the Court of Chancery; and their clerks are also sworn to secrecy. The witnesses are compellable by process of *subpœna*, as in the courts of common law, to appear and submit to examination. And when their depositions are taken, they are transmitted to the court with the same care that the answer of a defendant is sent.

If witnesses to a disputable fact be old and infirm, it is very usual to file a bill to perpetuate the testimony of those witnesses, although no suit is depending; for it may be, a man's antagonist only waits for the death of some of them to begin his suit. This is most frequent when lands are devised by will away from the heir at law; and the devisee, in order to perpetuate the testimony of the witnesses to such will, exhibits a bill in chancery against the heir, and sets forth the will *verbatim* therein, suggesting that the heir is inclined to dispute its validity; and then, the defendant having answered, they proceed to issue, as in other cases, and examine the witnesses to the will; after which the cause is at an end, without proceeding to any decree, no relief being prayed by the bill; but the heir is entitled to his costs, even though he contest the will. This is what is usually meant by *proving* a will in chancery.

When all the witnesses are examined, then, and not before, the depositions may be published, by a rule to pass publication; after which they are open for the inspection of all the parties; and copies may be taken of them. The cause is then ripe to be set down for hearing; which may be done at the procurement of the plaintiff or defendant, before either the lord chancellor or the master of the rolls, according to the discretion of the clerk in court, regulated by the nature and importance of the suit, and the arrears of causes depending before each of them respectively. Either party may be *subpœna'd* to hear judgment on the day so fixed for the hearing; and then, if the plaintiff do not attend, his bill is dismissed with costs; or if the defendant make default, a decree will be made against him, which will be final, unless he pay the plaintiff's costs of attendance, and shew good cause to the contrary on a day appointed by the court. A plaintiff's bill may also at any time be dismissed for want of prosecution, which is in the nature of a nonsuit at law, if he

suffer three terms to elapse without moving forward in the cause.

When there are cross causes, on a cross bill filed by the defendant against the plaintiff in the original cause, they are generally contrived to be brought on together, that the same hearing and the same decree may serve for both of them.

The method of hearing causes in court is usually this:—The parties on both sides appearing by their counsel, the plaintiff's bill is first opened, or briefly abridged, and the defendant's answer also, by the junior counsel on each side; after which the plaintiff's leading counsel states the case and the matters in issue, and the points of equity arising therefrom; and then such depositions as are called for by the plaintiff are read by one of the six clerks; and the plaintiff may also read such part of the defendant's answer as he thinks material or convenient: and, after this, the rest of the counsel for the plaintiff make their observations and arguments. Then the defendant's counsel go through the same process for him, except that they may not read any part of his answer; and the counsel for the plaintiff are heard in reply. When all are heard, the court pronounces the decree, adjusting every point in debate according to equity and good conscience; which decree being usually very long, the minutes of it are taken down, and read openly in court by the registrar.* The matter of costs to be given to either party is not here held to be a point of right, but merely discretionary, according to the circumstances of the case.

The chancellor's decree is either interlocutory or final. It very seldom happens that the first decree can be final, or conclude the cause; for if any matter of fact be strongly controverted, this court is so sensible of the deficiency of trial by written depositions, that it will not bind the parties thereby, but usually directs the matter to be tried by a jury; especially such important facts as the validity of a will, or whether A is the heir at law to B, or the existence of a *modus decimandi*, or real and immemorial composition for tithes. But as no jury can be summoned to attend this court, the fact is usually directed to be tried at the bar of the Court of King's Bench, or at the assizes.

So likewise, if a question of mere law arise in the course of a cause, as, whether by the words of a will an estate for life or in tail is created, or whether a future interest devised by a testator shall operate as a remainder or an executory devise, it is the practice of the court to refer it to the opinion of the judges of the Court of King's Bench or Common Pleas, upon a case stated for that purpose, wherein all the material facts are admitted, and the point of law is submitted to their decision; who thereupon hear it argued by counsel on both sides, and certify their opinion

* It is now the practice of the registrar to read the minutes of the decrees openly in court; but any party to the suit may procure a copy of them, and, if there is any mistake, may move to have them amended. But, after a decree has been formally drawn up and entered, no errors in it can be rectified on motion, or by any other proceedings than re-hearing the cause.

to the chancellor. And upon such certificate the decree is usually founded.

Another thing also retards the completion of decrees. Frequently long accounts are to be settled, incumbrances and debts to be inquired into, and an hundred little facts to be cleared up, before a decree can do full and sufficient justice. These matters are always, by the decree on the first hearing, referred to a master in chancery to examine, which examinations frequently last for years; and then he is to report the fact, as it appears to him, to the court. This report may be excepted to, disapproved, and over-ruled; or, otherwise, is confirmed and made absolute by order of the court.

When all issues are tried and settled, and all references to the master ended, the cause is again brought to hearing upon the matters of equity reserved, and a final decree is made; the performance of which is enforced (if necessary) by commitment of the person, or sequestration of the party's estate. And if by this decree either party think himself aggrieved, he may petition the chancellor for a re-hearing, whether it was heard before his lordship, or any of the judges sitting for him, or before the master of the rolls, or the vice-chancellor. For whoever may have heard the cause, it is the chancellor's decree, and must be signed by him before it is enrolled; which is done of course, unless a re-hearing be desired. Every petition for a re-hearing must be signed by two counsel, usually such as have been concerned in the cause, certifying that they apprehend the cause is proper to be re-heard.

And, upon the re-hearing, all the evidence taken in the cause, whether read before or not, is now admitted to be read; because it is the decree of the chancellor himself, who only now sits to hear reasons why it should not be enrolled and perfected; at which time all omissions of either evidence or argument may be supplied. But after the decree is once signed and enrolled, it cannot be reheard or rectified, but by bill of review, or by appeal to the House of Lords.

A *bill of review* may be had, upon apparent error in judgment appearing on the face of the decree; or by special leave of the court, upon oath made of the discovery of new matter or evidence, which could not possibly be had or used at the time when the decree passed. But no new evidence or matter then in the knowledge of the parties, and which might have been used before shall be a sufficient ground for a bill of review.

An *appeal to parliament*, that is, to the House of Lords, is the *dernier resort* of the subject who thinks himself aggrieved by an interlocutory order or final determination in this court; and it is effected by petition to the House of Peers, and not by writ of error, as upon judgment at common law. But no new evidence is admitted in the House of Lords upon any account; this being a distinct jurisdiction, which differs very considerably from those instances wherein the same jurisdiction revises and corrects its own acts, as in re-hearings, and bills of review.

The same course of proceedings is to be observed in all cases heard by the vice-chancellor, who is merely appointed an assistant judge to the lord-chancellor: for by the 53 Geo. III. cap. 24. the vice-chancellor is empowered to hear and determine all causes, matters, and things, which shall at any time be depending in the Court of Chancery, either as a court of law or equity; and all his decrees, orders, and acts, are to be considered as acts of the High Court of Chancery, subject however to be renewed, discharged, or altered by the lord-chancellor, who must sign every such order or decree, before it can be enrolled or considered valid.

CHAPTER XXIII.

Of the Courts of Law.

HAVING described the manner in which suits are carried on in the courts of common law and equity, we are naturally led to consider the constitution of the courts themselves; this will be the subject of the present chapter.

A *court* signifies a place where justice is judicially administered, of which some are of record, and some not. A *court of record* is that which hath power to hold pleas, according to the course of the common law, of real, personal, and mixed actions; and a *court not of record* is where the proceedings are not according to the course of the common law, nor yet enrolled.

In courts where writs are not issuable, the suit is begun by *plaint*, viz. by entering the action, the cause of complaint, &c.: and in inferior courts having particular jurisdictions, it must be set forth at large; for there nothing shall be extended to be within the jurisdiction, but what is expressly alleged to be so.

The courts of law and equity are the following:—1. The High Court of Chancery; 2. The King's Bench; 3. The Court of Common Pleas; 4. The Exchequer; 5. The Court of Assizes, &c.; to which may be added, 6. The Court of Insolvent Debtors.

THE COURT OF CHANCERY.

This is the highest court of judicature in the kingdom, next to the parliament, and is of very ancient institution. Its jurisdiction is of two kinds: ordinary, or legal; and extraordinary, or absolute.

The *ordinary court* is that wherein the lord chancellor, in his proceedings and judgments, observes the order and method of the common law; and in such cases the proceedings are filed or enrolled in the Petty-Bag Office.

This court holds plea of recognizances acknowledged in Chancery, writs of *scire facias* for repeal of letters patent, writs of partition, &c. and also of all personal actions by or against any officer of the court, and, by acts of parliament, of several offences and causes. All original writs, commissions of bankrupt, charitable uses, of idiots and lunatics, &c. issue out of this court, for which it is always open. One from hence may have an *habeas corpus*, prohibition, &c. in the vacation, which are to be had out of the other courts only in term time;* and here a *subpoena* may be issued to force witnesses to appear in other courts, when they have no power to call them. But, in prosecuting causes, if the parties descend to issue, this court cannot try it by jury; but the record is to be sent into the Court of King's Bench, and tried there, and afterwards remanded into the Court of Chancery; though if there be a demurrer in law, it shall be argued and adjudged here.

The extraordinary or unlimited court exercises jurisdiction in cases of equity, by way of *English* bill and answer, in abating the rigour of the common law; and where the courts of law are defective, it gives a remedy. It gives relief for and against infants, notwithstanding their minority; and for or against married women, called *feme coverts*, notwithstanding their coverture. All frauds and deceits are here relievable; as also all accidents to mortgagors, obligors, &c. against penalties and forfeitures, where the intention was to pay the debt; all breaches of trust, unreasonable engagements, &c. This court may force unreasonable creditors to compound debts; make executors &c. give security, and pay interest for money long in their hands; and here executors may sue one another, or one executor alone be sued without the rest; order may be made for the performance of a will; a decree may be made who shall have the tuition of a child; and this court may relieve copyholders against the ill usage of their lords; confirm title to lands, where the deeds are lost; make conveyances, defective though fraud or mistake, good and perfect; oblige men to come to account with each other; avoid the bar of actions by the Statute of Limitations, &c.

But in all cases where the plaintiff can have his remedy at law, he will not be relieved in Chancery; and long leases, as for one thousand years, naked promises, verbal agreements not executed, estates derived under concealed titles, &c. have been refused relief in this court; and mortgages are not relievable in equity after twenty years, where no demand has been made, or interest paid, &c. Also this court will not retain a suit for any thing under 10*l.* value, except it be in cases of charity; nor for lands, &c. under 40*s.* *per annum*; and it refuses to relieve persons in suits where the substance of them tends to the overthrow of any fundamental point of the common law, or act of parliament.

* By the 56 Geo. III. c. 90. the power of granting a writ of *habeas corpus* in vacation time is extended to the judges of the courts of King's Bench and Common Pleas, and the barons of the Exchequer.

And although the power of the Court of Chancery, in its equitable proceedings, is so great in the foregoing particulars, yet it is no court of record, and therefore can bind the person only, and not the estate of the defendant; and if the party refuse to obey the decree of this court, he must be committed until he does; in this case, if there be an order that one shall stand committed to the Fleet for breach of a decree, there must be a writ awarded for taking and imprisoning him.

No *subpoena* or process is to issue out of this court till a bill is filed, except in injunctions to stay waste, and suits at law, &c.; and on a plaintiff's dismissing his bill, or the defendant, for want of prosecution, the plaintiff is to pay full costs. A defendant not appearing on *subpoena* issued, and absconding to avoid being served therewith, the court may make an order for his appearance at a certain day, which shall be published in the Gazette; and if he do not appear, the plaintiff's bill shall be taken *pro confesso*, and the defendant's estate sequestrated to satisfy the plaintiff.

The lord chancellor, who presides in this court, is created such by the mere delivery of the king's great seal into his custody; whereby he becomes, without writ or patent, an officer of the greatest weight and power of any now subsisting in the kingdom, and superior in point of precedency to every temporal lord. He is a privy-councillor by his office, and, according to lord chancellor Ellesmere, prolocutor of the house of lords by prescription. To him belongs the appointment of all justices of the peace throughout the kingdom. Being, formerly, usually an ecclesiastic (for none else were then capable of an office so conversant in writings), and presiding over the royal chapel; he became keeper of the king's conscience; visitor, in right of the king, of all hospitals and colleges of the king's foundation; and patron of all the king's livings under the value of twenty marks *per annum* in the king's books. He is the general guardian of all infants, idiots, and lunatics; and has the general superintendence of all charitable uses in the kingdom. And all this, over and above the vast and extensive jurisdiction which he exercises in his judicial capacity in the Court of Chancery.

VICE-CHANCELLOR'S COURT.

In consequence of the extreme pressure of business in the Court of Chancery, this court was created by an act of the 53 Geo. III. c. 24. for the express purpose of assisting the lord chancellor in his judicial functions; and, therefore, all causes which were before heard by the lord chancellor, may now be heard and decided in the vice-chancellor's court: but his judgments and decrees are to be signed by the lord chancellor, who has also the authority to reverse, discharge, and alter them.

The vice-chancellor has rank next to the master of the rolls, and is attended by a secretary, train-bearer, and usher. His office is held during good behaviour; and he is also removeable by the king, upon an address of both houses of parliament.

THE COURT OF KING'S BENCH,

So called because the king used formerly to sit there in person, the style of the court still being *coram ipso rege*, is the supreme court of common law in the kingdom; consisting of a chief justice and three *puisne* justices, who are by their office the sovereign conservators of the peace, and supreme coroners of the kingdom.

The jurisdiction of this court is very extensive. It keeps all inferior courts within the bounds of their authority, and may either remove their proceedings, to be determined here, or prohibit their progress below. It superintends all civil corporations in the kingdom. It commands magistrates and others to do what their duty requires, in every case where there is no other specific remedy. It protects the liberty of the subject, by speedy and summary interposition. It takes cognizance both of criminal and civil causes; the former in what is called the crown side, or crown office; the latter, in the plea side of the court.

On the plea side, or civil branch, it hath an original jurisdiction and cognizance of all actions of trespass, or other injury alleged to be committed *vi et armis*; of actions for forgery of deeds, maintenance, conspiracy, deceit, and actions on the case which allege any falsity or fraud; all of which savour of a criminal nature, although the action is brought for a civil remedy, and makes the defendant liable in strictness to pay a fine to the king, as well as damages to the injured party.

The same doctrine is also now extended to all actions on the case whatsoever; but no action of debt or detainee, or other mere civil action, can by the *common law* be prosecuted by any subject in this court by original writ out of Chancery; though an action of debt given by *statute*, may be brought in the King's Bench as well as in the Common Pleas. And yet this court might always have held plea of any civil action (other than actions real), provided the defendant was an officer of the court, or in the custody of the marshal or prison-keeper of this court, for a breach of the peace, or any other offence. And in process of time it began by a fiction to hold plea of all personal actions whatsoever, and has continued to do so for ages; it being surmised that the defendant is arrested for a supposed trespass, which he never has in reality committed; and being thus in the custody of the marshal of this court, the plaintiff is at liberty to proceed against him for any other personal injury; which surmise, of being in the marshal's custody, the defendant is not at liberty to dispute.

This court is likewise a court of appeal, into which may be removed by writ of error all determinations of the Court of Common Pleas, and of all inferior courts of record in England; and to which, till lately, a writ of error lay also from the Court of King's Bench in Ireland. Yet even this so high and honourable court is

not the *dernier resort* of the subject; for, if he be not satisfied with any determination here, he may remove it by writ of error into the House of Lords, or the Court of Exchequer Chamber, as the case may happen, according to the nature of the suit, and the manner in which it has been prosecuted.

THE COURT OF COMMON PLEAS

Is one of the king's courts, held in Westminster-Hall, or other certain place; it is not to follow the king and his court, but to be held at some place certain; nor shall be removed without warning by adjournment.

All actions belonging to this court come here, either by original, as on arrests and outlawries; or by privilege or attachment, for or against privileged persons; or out of inferior courts not of record. And all civil causes, real, personal, or mixed, are here brought and determined; though regularly this court cannot hold plea in any action real or personal, but by writ out of Chancery, returnable here; unless it be by bill for or against an officer or other privileged person of the court.

The Common Pleas is said to have been the only court for real causes concerning lands; and in personal and mixed actions it hath a concurrent jurisdiction with the King's Bench: but it hath no cognizance of pleas of the crown; and common pleas are all pleas that are not such. Its jurisdiction, like that of the other courts of Westminster, is general, and extends throughout England; and hither suits are removed out of other courts by divers writs, as by *pone*, *recordare*, writ of false judgment, &c.

And this court, besides having jurisdiction for punishment of its officers and ministers, may grant prohibitions to keep temporal and ecclesiastical courts within due bounds.

The judges of this court are four in number, one chief and three *justice* justices, created by the king's letters patent, who sit every day in the four terms to hear and determine all matters of law arising in civil causes, whether real, personal, or mixed and compounded of both. These it takes cognizance of, as well originally as upon removal from the inferior courts. But a writ of error, in the nature of an appeal, lies from this court into the Court of King's Bench.

THE COURT OF EXCHEQUER

Is inferior in rank, not only to the court of King's Bench, but to the Common Pleas also. Its province is, to order the revenues of the crown, and to recover the king's debts and duties. It is called the Exchequer, from the chequered cloth, resembling a chess-board, which covers the table there; and on which, when certain of the king's accounts are made up, the sums are marked and scored in counters. It consists of two divisions; the receipt of

the Exchequer, which manages the royal revenue; and the court, or judicial part of it, which is again subdivided into a court of equity and a court of common law.

The court of equity is held in the exchequer-chamber before the lord treasurer and the chancellor of the exchequer, the chief baron, and three *justice* ones. The primary and original business of this court is to call the king's debtors to account, by bill filed by the attorney-general; and to recover any lands, tenements, or hereditaments, any goods, chattels, or other profits or benefits, belonging to the crown. And as, by a fiction, almost all sorts of civil actions are now allowed to be brought in the King's Bench, in like manner, by another fiction, all kinds of personal suits may be prosecuted in the Court of Exchequer. For as all the officers and ministers of this court have, like those of other superior courts, the privilege of suing and being sued only in their own court; so also, the king's debtors and farmers, and all accountants of the Exchequer, are privileged to sue and implead all manner of persons in the same court of equity that they themselves are called into. They have likewise privilege to sue and implead one another, or any stranger, in the same kind of common-law actions (where the person only is concerned) as are prosecuted in the Court of Common Pleas.

This gives original to the common-law part of their jurisdiction, which was established merely for the benefit of the king's accountants, and is exercised by the barons only of the exchequer, and not the treasurer or chancellor. The writ upon which all proceedings here are grounded, is called a *quo minus*; in which the plaintiff suggests, that he is the king's farmer or debtor, and that the defendant hath done him the injury or damage complained of, *qua minus sufficiens existit*, by which he is the less able to pay the king his debt or rent. But now, by the suggestion of privilege, any person may be admitted to sue in the Exchequer as well as the king's accountant. The surmise of being debtor to the king is therefore become matter of form, and mere words of course, and the court is open to all the nation equally. The same holds with regard to the equity side of the court; for there any person may file a bill against another, upon a bare suggestion that he is the king's accountant; but whether he is so or not, is ever controverted. In this court, on the equity side, the clergy have long used to exhibit their bills for the nonpayment of tithes, a which case the surmise of being the king's debtor is no fiction, they being bound to pay him the first-fruits and annual tenths. But the chancery has of late years obtained a large share in this business.

An appeal from the equity side of this court lies immediately to the House of Peers: but from the common-law side, in pursuance of the 31 Edw. III. c. 12. a writ of error must be first brought into the Court of Exchequer-Chamber. And from the determination there had, there lies, in the *dernier resort*, a writ of error to the House of Lords.

The next court we shall mention is one that hath no original jurisdiction, but is only a court of appeal, to correct the errors of other jurisdictions: this is

THE COURT OF EXCHEQUER CHAMBER,

Which was first created by the 31 Edw. III. c. 12. to determine causes upon writs of error from the common-law side of the Court of Exchequer. And to that end it consists of the lord chancellor and lord treasurer, the justices of the King's Bench and Common Pleas. In imitation of which, a second court of Exchequer-Chamber was erected by the 27 Eliz. c. 8. consisting of the justices of the Common Pleas, and barons of the Exchequer, before whom writs of error may be brought to reverse judgments in certain suits originally begun in the Court of King's Bench.— Into the Court of Exchequer-Chamber (which then consists of all the judges of the three superior courts, and now and then the lord chancellor also) are sometimes adjourned, from the other courts such causes as the judges, upon argument, find to be of great weight and difficulty, before any judgment is given upon them in the court below.

From all the branches of this Court of Exchequer-Chamber, a writ of error lies to

THE HOUSE OF PEERS,

Which is the supreme court of judicature in the kingdom, having at present no original jurisdiction over causes, but only upon appeals and writs of error, to rectify any injustice or mistake of the law committed by the courts below; and is, in all causes, the last resort, from whose judgment no farther appeal is permitted, but every subordinate tribunal must conform to its determinations.

THE COURTS OF ASSIZE AND NISI PRIUS

Are composed of two or more commissioners, who are twice in every year sent by the king's special commission all round the kingdom (except London and Middlesex, where the courts of *Nisi Prius* are holden in and after every term, before the chief or other judge of the several superior courts,* and except the four northern counties, where the assizes are holden only once a year) to try by a jury of the respective counties the truth of such matters of fact as are then under dispute in the courts of Westminster-Hall.

These commissioners must consist of one of the judges of the courts at Westminster, or a king's serjeant. They usually make their circuits in the respective vacations after Hilary and Trinity terms.

The judges upon their circuits sit by virtue of five several authorities: 1. The commission of the *peace*. 2. A commission of

* These courts of *Nisi Prius*, in London and Middlesex, are called the *Sittings after Term*.

oyer and terminer. 3. A commission of general *gaol delivery*. 4. A commission of *assize*, directed to the judges and serjeants therein named to take (together with their associates) assizes in the several counties; that is, to take the verdict of a peculiar species of jury called an assize, and summoned for the trial of *landed disputes*. The other authority is, 5. That of *nisi prius*, which is a consequence of the commission of *assize* being annexed to the office of those justices by the statute of Westm. 2. 13 Edw. I. c. 30. and it empowers them to try all questions of fact issuing out of the courts at Westminster, that are then ripe for trial by jury. These, by the course of the courts, are usually appointed to be tried at Westminster, in some Easter or Michaelmas term, by a jury returned from the county wherein the cause of action arises, but with this proviso, *nisi prius*, *unless before* the day prefixed the judges of assize come into the county in question. This they are sure to do in the vacations preceding each Easter and Michaelmas term, which saves much expence and trouble.

INSOLVENT DEBTORS' COURT.

This court is created by an act of the 1 Geo. IV. which enacts, that, from and after the passing of this act, it shall be lawful for his majesty to appoint a chief and two other commissioners, being barristers at law, of ten years standing at the least, to be his Majesty's Commissioners to preside in a court to be called "The Court for Relief of Insolvent Debtors," which shall be a court of record for the purposes of this act. And such court may appoint a chief clerk, a provisional assignee, a receiver, and so many officers of such court as the lord chancellor, lord keeper, or lords commissioners for the custody of the great seal of the United Kingdom, together with the lords chief justices of the King's Bench and Common Pleas, and the chief baron of the Exchequer, shall from time to time deem necessary; and such court, or one commissioner thereof, shall sit twice a week, for the dispatch of business throughout the year, in some convenient place or places in the cities of London or Westminster, or in the county of Middlesex, within the bills of mortality.*

The other courts which we have to notice may be reduced to the following heads: 1. The County-Court; 2. The Court-Leet; 3. The Court-Baron.

1. The COUNTY-COURT is a court kept by the sheriff of every county, and divided into two sorts: one retaining the general name, as the county-court, held every month, before the sheriff or his deputy: the other called the *turn*, held twice in every year, viz. within a month after Easter and Michaelmas.

By the common law, every sheriff ought to make his turn or circuit throughout all the hundreds in his county, in order to hold a court in every hundred for the redressing of common grievances, and preservation of the peace, &c.; and the turn is the king's leet,

* For the act itself, see page 647.

through all the county; it being a court of record, of which the sheriff is judge. And before the courts at Westminster were erected, the county courts were the chief courts of the kingdom.

But the power of the county-court was much reduced by the statute of *magna charta*. It hath now the determination of certain trespasses and debts under 40s.; but it holds no plea of any debt or damage to the value of 40s. or more; nor of trespass *vi et armis*, &c. But of debt and other actions personal above that sum, the sheriff may hold plea by force of a writ of justices, which is in nature of a commission to him to do it.

No sheriff is to enter in the county-court any plaint in the absence of the plaintiff, nor above one plaint for one cause, on pain of 40s. And out of this court causes are removed by *recordari*, *pone*, &c. into the courts of King's Bench and Common Pleas.

2. The COURT LEET is a court of record incident to a hundred, ordained for punishing offences against the crown. It is derived out of the sheriff's turn, and inquires of all offences under treason; but those which are to be punished with loss of life or member are only inquirable and presentable there, and must be certified over to the justices of assize.

This court is called the *view of frank pledge*; for that the king is to be there certified, by the view of the steward, how many people are within every leet, and have an account of their good manners and government; and all persons above twelve years of age, which have remained there for a year and a day, may be sworn to be faithful to the king. Also every one, from the age of twelve to sixty years, that dwells within the leet, is obliged to do suit in this court, except peers, clergymen, &c.

In the court-leet, the steward is the judge, as the sheriff is in the turn: and this court is to be kept twice a year, once in a month after Easter, and the other within a month after Michaelmas, at a certain place within the precinct; and the steward hath power to elect officers, as constables, tithing-men, &c. as well as to punish offenders. The usual method of punishment in the leet is by fine and amercement; and a presentment here subjects the party to them: the former is assessed by the steward, and the latter by the jury: for both of which the lord may have an action of debt, or take a distress.

This court inquires of and punishes misdemeanors, encroachments, nuisances, &c. purprestures in lands or woods; or houses set up, or beat down, and other annoyances; bounds taken away; ways or waters turned, or stopped; of thievery, and hues and cries not pursued; of bloodshed, escapes, persons outlawed, money-coiners, treasure found, assize of bread and ale, persons keeping ale-houses without licence, false weights and measures, unlawful games, offences relating to the game; of tanners selling insufficient leather, forestallers and engrossers of markets, &c.; of victuallers and labourers, unlawful fishing, idle persons, &c.

And the lord of the leet ought to have a pillory and a tumbrel, &c. to punish offenders; or, for want thereof, he may be fined, or the liberty seized: and all towns within the leet are to have stocks in repair; and the town that hath none is to forfeit 5*l*.

3. The COURT-BARON is that court which every lord of a manor has within his own precinct; and is an inseparable incident to a manor. It must be held by prescription, for it cannot be created at this day, and is to be kept on some part of the manor.

This court is of two natures: 1. By the common law, which is the baron's or freeholders' court, of which the freeholders, being suitors, are the judges; 2. By custom, which is called the customary court, and concerns the customary tenants and copyholders, whereof the lord or his steward is judge. The court-baron may be of this double nature, or one may be without the other. The freeholders' court hath jurisdiction for trying actions of debt, trespass, &c. under 40*s*. and may be held every three weeks; being something like the county court. But on recovery in debt, they have not power to make execution, only to restrain the defendant's goods, and retain them till satisfaction be made. The other court-baron is for taking and passing of estates, surrenders, admittances, &c.; and is kept but once or twice in the year (usually with the court leet), unless it be on purpose to grant an estate, and then it may be holden as often as required.

In this court the homage jury are to inquire that the lords do not lose their services, duties, or customs; but that the tenants make their suits of court, pay their rents, heriots, &c. and keep lands and tenements in repair, &c.: and every public trespass may be punished here by amercement, on presenting the same.

There is yet another court known to the law of England, which is the COURT OF PIE-POUDRE, so called from the dusty feet of the suitors, and derived, according to some, from *piéd paldreaux* (a pedlar, in old French), and therefore signifying the court of such petty chapmen as resort to fairs or markets. It is a court of record incident to every fair and market, of which the steward of him who owns or has the toll of the market is the judge: and its jurisdiction extends to administer justice for all commercial injuries done in that fair or market, and not in any preceding one. So that the injury must be done, complained of, heard, and determined, within the compass of one and the same day, unless the fair continue longer. This court has cognizance of all matters of contract that can possibly arise within the precinct of that fair or market; and the plaintiff must make an oath that the cause of action arose there. From this court a writ of error lies, in the nature of an appeal, to the courts at Westminster; which are now also bound, by the 19 Geo. I. c. 70. to issue writs of execution in aid of its process after judgment, where the person or effects of the defendant are not within the limits of this inferior jurisdiction.

CHAPTER XXIV.

Of Courts Ecclesiastical, Military, Maritime, &c.

BESIDES the several courts which we have already treated of, there still remain some others to be noticed, of a jurisdiction equally public and general, which take cognizance of other species of injuries, of an ecclesiastical, military, and maritime nature, and therefore are properly distinguished by the title of ecclesiastical courts, courts military, and courts maritime.

ECCLESIASTICAL COURTS.

In briefly recounting the various species of ecclesiastical courts, or, as they are often called, courts Christian (*curiæ christianitatis*), we shall begin with the lowest, and ascend gradually to the supreme court of appeal.

1. The ARCHDEACON'S COURT is held, in the archdeacon's absence, before a judge appointed by himself, and called his official; and its jurisdiction is sometimes in concurrence with, and sometimes in exclusion of the bishop's court of the diocese. From hence, however, by statute 24 Hen. VIII. c. 12. an appeal lies to that of the bishop.

2. The CONSISTORY COURT of every diocesan bishop is held in their several cathedrals, for the trial of all ecclesiastical causes arising within their respective dioceses. The bishop's chancellor, or his commissary, is the judge; and from his sentence an appeal lies to the archbishop of each province respectively.

3. The COURT OF ARCHES is a court of appeal belonging to the archbishop of Canterbury; whereof the judge is called the *dean of the arches*. His proper jurisdiction is only over the thirteen peculiar parishes belonging to the archbishop in London; but the office of dean of the arches having been for a long time united with that of the archbishop's principal official, he now, in right of the last-mentioned office, (as doth also the official principal of the archbishop of York) receives and determines appeals from the sentences of all inferior ecclesiastical courts within the province. And from him an appeal lies to the king in chancery (that is, to a court of delegates appointed under the king's great seal), as supreme head of the English church.

4. The COURT OF PECULIARS is a branch of, and annexed to the court of arches. It has a jurisdiction over all those parishes dispersed through the province of Canterbury in the midst of other dioceses, which are exempt from the ordinary's jurisdiction, and

subject to the metropolitan only. All ecclesiastical causes arising within these peculiar or exempt jurisdictions are, originally, cognizable by this court; from which an appeal lies to the king in chancery.

5. The PREROGATIVE COURT is established for the trial of all testamentary causes, where the deceased hath left *bona notabilia* within two different dioceses. In which case the probate of wills belongs to the archbishop of the province. And all causes relating to the wills, administrations, or legacies of such persons are, originally, cognizable herein, before a judge appointed by the archbishop, called the judge of the prerogative court: from whom an appeal lies to the king in chancery.

6. The great court of appeal in all ecclesiastical causes, viz. the COURT OF DELEGATES, is, by 25 Hen. VIII. c. 19. appointed by the king's commission under the great seal. This commission is frequently filled with lords spiritual and temporal, and always with the judges and doctors of the civil law. But in case the king himself be party in any of these suits, the appeal does not then lie to him in chancery; but to all the bishops of the realm, assembled in the upper house of convocation.

7. A COMMISSION OF REVIEW is a commission sometimes granted, in extraordinary cases, to revise the sentence of the court of delegates. But it is not a matter of right, which the subject may demand *ex debito justitiæ*, but merely a matter of favour.

COURTS MILITARY.

The only court of this kind known to the law is the COURT OF CHIVALRY, formerly held before the lord high constable and earl marshal of England jointly. This court, by the 13 Ric. II. c. 2. hath cognizance of contracts and other matters touching deeds of arms and war, as well out of the realm as within it: and from its sentence an appeal lies immediately to the king in person.

MARITIME COURTS.

The maritime courts are, the Court of Admiralty, and its courts of appeal.

The COURT OF ADMIRALTY is held before the lord high admiral of England, or his deputy, who is called the judge of the court. It is no court of record, any more than the spiritual courts. From the sentence of the Admiralty judge an appeal always lay, in ordinary course, to the king in chancery. But it is expressly declared by statute, that, upon appeal made to the chancery, the sentence definitive of the delegates appointed upon commission shall be final.

In cases of prize-vessels taken in time of war, and condemned in any courts of admiralty or vice-admiralty as lawful prize or not, the appeal lies to certain commissioners of appeals, consisting chiefly of the privy council, and not to judges delegates.

COURTS OF A SPECIAL JURISDICTION.

These are principally—1. The COURT OF COMMISSIONERS OF SEWERS, whose jurisdiction is to overlook the repairs of sea-

banks and sea-walls, and the cleansing of rivers, public streams, ditches, and other conduits, whereby any waters are carried off, is confined to such county or particular district as the commission shall expressly name. The commissioners are a court of record, and may fine and imprison for contempts; they may proceed by jury, or upon their own view, and may make order for the removal of any annoyances, or the safeguard or conservation of the sewers within their commission, either according to the laws and customs of Romney Marsh, or otherwise. They may also assess such rates, or scots, upon the owners of lands within their district, as they shall judge necessary; if any person refuse to pay them, they may levy the same by distress of his goods and chattels; or they may, by the 23 Hen. VIII. c. 5. sell his freehold lands, and, by the 7 Ann. c. 10. his copyhold also.

THE COURT OF THE MARSHALSEA, and the PALACE COURT at Westminster, though two distinct courts, are frequently confounded together. These courts have jurisdiction to hold plea of all manner of personal actions whatsoever, which shall arise between any parties within twelve miles of Whitehall, and are now held once a week, in the borough of Southwark: a writ of error lies from thence to the Court of King's Bench.

THE LORD MAYOR'S COURT, for actions of debt and trespass, attachments, penal actions, appeals from inferior courts, and apprenticeships. Decisions are given in fourteen days, at an expence not exceeding 30s. The court is held by the recorder, in the King's Bench, Guildhall. An action may be removed by *habeas corpus* or *certiorari* into a superior court, if the debt exceed 5*l.*; but if the debt be under 10*l.* it cannot be allowed until bail be put in.

THE SHERIFF'S COURT, for debt and trespass, case, account, covenant, attachment, and sequestration, is held by the sheriff and his deputy, every Wednesday, Thursday, Friday, and Saturday, at Guildhall. An action may be removed by *habeas corpus* to a superior court at Westminster, if the debt exceed 5*l.*; but if the debt be under 10*l.* it cannot be allowed until bail be put in.

Another species of private courts of a limited jurisdiction are those of the principality of Wales. By statutes of Henry VIII. courts baron, hundred, and the county-courts, are there established as in England. A session is also to be held twice every year in each county by judges appointed by the king, to be called the GREAT SESSIONS of the several counties in Wales; in which all pleas of real and personal action shall be held, with the same form of process, and in as ample a manner, as in the court of Common Pleas at Westminster. And writs of error shall lie from judgments therein (it being a court of record) to the Court of King's Bench at Westminster.

But there is one species of courts yet to be noticed; we mean the COURTS OF REQUESTS, or COURTS OF CONSCIENCE, for the recovery of small debts. The time and expence of proceeding in these courts are very inconsiderable, which makes them a great

benefit to trade; and therefore divers trading towns and other districts have obtained acts of parliament for establishing Courts of Conscience upon nearly the same plan as that in the city of London. To this court any person (whether residing within the city of London or elsewhere), having any debt not exceeding 5*l.* due from any person residing within the city or liberties,* may cause such debtor to be summoned, by personal service, or by a printed or written summons left at the dwelling-house, lodging, or place of abode, shop, stall, or other place of dealing, of such debtor; and after such summons, the commissioners may make such order, decree, judgment, or proceeding between the parties, as shall be consistent with equity and good conscience, and may direct the payment of such debts, either to be paid in one sum, or by such instalments as to them shall seem reasonable.

And when such debts are due from two partners, it will be sufficient to summon one of them.

Either the plaintiff or defendant may cause any persons to be summoned, under a penalty of 40*s.* as often as shall be deemed necessary, either by personal summons, or by leaving the same at their last or usual place of abode, to appear as witnesses.

Where a debt not exceeding 5*l.* shall have been contracted for necessities by any person under age, and employed as a clerk, book-keeper, journeyman, shopman, labourer, or otherwise seeking a livelihood within the city of London, the person to whom such debt shall be due may recover in this court, in the same manner as if the person by whom such debt was contracted were of full age; and where any sum under 5*l.* shall be due to any menial or other servant under age, such servant may sue for and recover the same, as if the contract had been made at full age.

No attorney, solicitor, or other officer of any of the courts of law and equity at Westminster, shall have any privilege of exemption from the jurisdiction of this court.

And if any action or suit shall be commenced in any other court for any debt not exceeding 5*l.* and recoverable in this court, the plaintiff shall not be entitled to costs; and if the verdict shall be for the defendant, and the judge before whom such cause was tried shall certify that such debt ought to have been recovered in this court, the defendant shall have double costs, and the same remedy for recovering the same as he might have had in recovering any costs by law.

But no person shall be prevented from distraining for rent, or bringing actions for recovering the same when due.

The act does not extend to any debt where any title of freehold or lease for years of any lands or tenements shall come in question, nor to any debt by specialty, which shall not be for payment of a certain sum, nor any debt that shall arise from testament or matrimony, or any thing belonging to the ecclesiastical court.

* Any person seeking a livelihood by working, &c. within the jurisdiction of the court, may be summoned, though he may lodge or keep a house elsewhere.

BOOK II.

OF PUBLIC OFFENCES.

CHAPTER I.

Crimes and Misdemeanors, with other matters, defined.

THE preceding pages of this work having been devoted to the consideration of Private Wrongs, we now proceed to the consideration of those of a public nature, called **CRIMES** and **MISDEMEANORS**.

A *crime* or *misdemeanor*, is an act committed or omitted, in violation of a public law either forbidding or commanding it. This definition comprehends both crimes and misdemeanors; which are mere synonymous terms; though the word *crimes* is made to denote such offences as are of a deeper and more atrocious dye; while smaller faults, and omissions of less consequence, are comprised under the gentler name of *misdemeanors*.

With respect to persons capable of committing crimes: the law, in some cases, privileges an *infant*, under the age of twenty-one, as to common misdemeanors, so as to escape fine, imprisonment, and the like; and particularly in cases of omission, as not repairing a bridge, or a highway, and other similar offences; for not having the command of his fortune till twenty-one, he wants the capacity to do those things which the law requires. But where there is any notorious breach of the peace, a riot, battery, or the like; for these, an infant above the age of fourteen is equally liable to suffer, as a person of the full age of twenty-one.

In capital crimes, the law is still more minute and circumspect; distinguishing with great nicety the several degrees of age and discretion. But the capacity of doing ill, or contracting guilt, is not so much measured by years and days, as by the strength of understanding and judgment of the criminal. For one lad of eleven years old may have as much cunning as another at fourteen. Under seven years of age an infant cannot be guilty of felony; but at eight he may. Also, under fourteen, though an infant shall be *primâ facie* adjudged to be *doli incapax*; yet if it appear to the court and jury that he was *doli capax*, and could discern between good and evil, he may be convicted and suffer death. But in all cases the presumption shall be in favour of his innocence, until he attains the age of fourteen years.

In criminal cases, *idiots* and *lunatics* are not chargeable for their own acts, if committed when under these incapacities; not even for treason itself. Also, if a man in his sound memory commit a capital offence, and, before arraignment for it, he becomes mad, he cannot be arraigned. And if, after he has pleaded, he becomes mad, he cannot be tried. If, after trial and conviction,

he loses his senses, judgment cannot be pronounced; and if, after judgment, he becomes of nonsane memory, execution must be stayed. But if there be any doubt, whether the party be *compos* or not, this is to be tried by a jury. And if he be so found, a total idiotcy, or absolute insanity, excuses from the guilt of any criminal action committed under such deprivation of the senses; but if a lunatic hath lucid intervals of understanding, he is to answer for what he does in those intervals, as if he had no deficiency.

If, in the performance of a lawful act, any mischief follows, the party is excused from guilt: but if a man be doing any thing unlawful, and a consequence ensues which he does not foresee or intend, as the death of a man, or the like, his want of foresight is no excuse; for, being guilty of one offence which is unlawful, he is criminally guilty of whatever consequence may follow.

Ignorance, or mistake, wherein a man, intending to do a lawful act, does that which is unlawful, is not criminal. But this must be an ignorance or mistake of fact, and not an error in point of law. As if a man, intending to kill a thief or housebreaker, in his own house, by mistake kill one of his own family, this is no criminal action: but if a man thinks he has a right to kill a person excommunicated or outlawed, wherever he meets him, and does so; this is wilful murder.

If a woman commit theft, burglary, or other civil offences, against the laws, by the coercion of her husband, or even in his company, she is not guilty of any crime; being considered as acting by compulsion, and not of her own will. But this rule admits of an exception in crimes that are *mala in se*, and prohibited by the law of nature, as murder and the like. In treason also, no plea of coverture can excuse the wife; no presumption of the husband's coercion can extenuate her guilt. Also, a wife may be indicted and set in the pillory with her husband, for keeping a brothel. And in all cases, where the wife offends alone, without the company or coercion of her husband, she is responsible for her offence, as much as any feme sole.

All persons committing crimes are considered either as principals or accessaries.

A man may be *principal* in an offence in two degrees. A principal in the first is he that is the actor or perpetrator of the crime; and in the second, who is present, aiding, and abetting the fact to be done. Which presence need not always be an actual standing by, within sight or hearing of the fact; but there may be also a constructive presence, as when one commits a robbery or murder, and another keeps watch or guard at some convenient distance. And this rule hath also other exceptions: for in case of murder by poisoning, a man may be a principal felon, by preparing and laying the poison, or persuading another to drink it who is ignorant of its poisonous quality, or giving it to him for that purpose, and yet not administer it himself, nor be present when the very deed of poisoning is committed. And the same holds with regard to other murders committed in the absence of the murderer, by means which he had prepared beforehand, and which probably

could not fail of their mischievous effect: as, by laying a trap or pitfall for another, whereby he is killed; letting out a wild beast, with an intent to do mischief; or exciting a madman to commit murder, so that death thereupon ensues. In all these cases the party offending is guilty of murder as a principal.

An *accessary* is he who is not the chief actor in the offence, nor present at its performance, but in some way concerned therein, either *before* or *after* the fact committed.

In high treason there are no accessaries, but all are principals; the same acts that make a man accessary in felony, making him a principal in high treason. In *petit treason*, murder, and felonies with or without benefit of clergy, there may be accessaries, except only in those offences which by judgment of law are sudden and unpremeditated, as manslaughter and the like; which therefore cannot have any accessaries before the fact. So, too, in *petit larceny*, and in all crimes under the degree of felony, there are no accessaries either before or after the fact; but all persons concerned therein, if guilty at all, are principals.

As to accessaries *before* the fact: they are those who, being absent at the time of the crime committed, do yet procure, counsel, or command others to commit a crime. Herein absence is necessary to make a man an accessary. If A advise B to kill another, and B does it in the absence of A, B is principal, and A is accessary in the murder. And this holds, even though the party killed be not *in rerum naturâ* at the time of the advice given: as if A, the reputed father, advise B, the mother of a bastard child unborn, to strangle it when born, and she does so, A is accessary to this murder. And it is also settled, that whoever procures a felony to be committed, though it be by the intervention of a third person, is an accessary before the fact.

It is likewise a rule, that he who in anywise commands or counsels another to commit an unlawful act, is accessary to all that ensues upon that unlawful act, but is not accessary to any act distinct from the other.

And, for the due punishment of accessaries before the fact to burglary, robbery, and larceny, in cases where the principal offenders shall not have been discovered, or shall be concealed, or not be amenable to justice; it is enacted, by the 3 Geo. IV. c. 38. § 4. if any person or persons shall counsel, hire, procure, or command any other person or persons to commit any burglary, robbery, or larceny whatsoever, of the degree of grand larceny, then and in any such case (except where the person or persons actually committing any such felony as aforesaid shall have been actually convicted thereof) the person or persons so counselling, hiring, procuring, or commanding as aforesaid, shall be held and deemed guilty of, and may be prosecuted for a misdemeanor, and being convicted thereof shall be liable to be imprisoned only, or to be imprisoned and kept to hard labour, in the common gaol, house of correction, or penitentiary house, for any term not exceeding two years, although the principal felon or felons be concealed or conveyed away, or be not before convicted of any such

felony as aforesaid, and whether he, she, or they, is or are amenable to justice or not; any law or statute to the contrary notwithstanding: provided always, that any such offender, after having been prosecuted and convicted under this act, shall not for the same offence be afterwards punished, or liable to be punished, as an accessory before the fact, if the principal felon or felons shall be afterwards convicted.

An accessory *after* the fact may be where a person, knowing a felony to have been committed, receives, relieves, comforts, or assists the felon. Therefore, to make an accessory *ex post facto*, it is requisite that he know of the felony committed, and that he receive, relieve, comfort, or assist him. And, generally, any assistance whatever given to a felon, to hinder his being apprehended, tried, or suffering punishment, makes the assister an accessory; as furnishing him with a horse to escape his pursuers, money or victuals to support him, a house or other shelter to conceal him, or open force or violence to rescue or protect him.

So likewise, to convey instruments to a felon to enable him to break gaol, or to bribe the gaoler to let him escape, makes a man an accessory to the felony.

To buy or receive stolen goods, knowing them to be stolen, falls under none of these descriptions; but, by the 5 Ann. c. 31; and 4 Geo. I. c. 11. all such receivers are now made accessaries, where the principal felony admits of accessaries), and may be transported for fourteen years;* and, in the case of receiving linen goods stolen from the bleaching grounds, they are, by statute, declared felons without benefit of clergy.

The felony must be complete at the time of the assistance given, else it makes not the assistant an accessory. As, if one wound another mortally, and after the wound is given, but before death ensues, a person assists or receives the delinquent, this does not make him accessory to the homicide; for, till death ensues, there is no felony committed.

But where a felony is actually complete, the nearest relations are not suffered to aid or receive one another. If the parent assist his child, or the child the parent; if the brother receive the brother, the master his servant, or the servant his master; or even if the husband receive his wife; who have any of them committed felony, the receivers become accessaries after the fact.

CHAPTER II.

Of Offences against Religion.

HAVING shewn who may be guilty of crimes, we will now proceed to enumerate the several species of offences known to the law

* Buying goods at an under value is presumptive evidence that the buyer knew them to be stolen.

of England; and shall first describe those against religion.

Of this species the first is that of APOSTACY, or a total renunciation of Christianity, by embracing either a false religion, or no religion at all. This offence can only take place in such as have once professed the true religion. By the 9 & 10 W. III. c. 32. if any person educated in, or having made profession of the Christian religion, shall, by writing, printing, teaching, or advised speaking, deny the Christian religion to be true, or the holy scriptures to be of divine authority, he shall, upon the first offence, be rendered incapable of holding any office or place of trust; and for the second, be rendered incapable of bringing any action, being guardian, executor, legatee, or purchaser of lands, and shall suffer three years imprisonment, without bail; except he repent within four months after his first conviction, and renounce his error in open court.

A second offence is that of HERESY, which consists, not in a total denial of Christianity, but of some of its essential doctrines, publicly and obstinately avowed. By the 9 & 10 W. III. c. 32. it is enacted, that if any person, educated in the Christian religion, shall, by writing, printing, teaching, or advised speaking, deny any one of the persons of the Holy Trinity to be God, or maintain that there are more Gods than one, he shall suffer the same penalties as in the case of apostacy.

Another species of offence against religion are those which affect the established church. And these are either positive or negative: *positive*, by reviling its ordinances; or *negative*, by non-conformity to its worship.

And, first, of REVILING THE ORDINANCES of the church. It is provided, by the 1 Edw. VI. c. 1. and 1 Eliz. c. 1. that whoever reviles the sacrament of the Lord's supper, shall be punished by fine and imprisonment: and by the 1 Eliz. c. 2. if any minister shall speak any thing in derogation of the Book of Common Prayer, he shall, if not beneficed, be imprisoned for one year for the first offence, and for life for the second: and if he be beneficed, he shall, for the first offence, be imprisoned six months, and forfeit a year's value of his benefice: for the second offence, he shall be deprived, and suffer one year's imprisonment; and for the third, shall in like manner be deprived, and suffer imprisonment for life. And if any person whatever shall, in plays, songs, or other open words, speak any thing in derogation, depraving, or despising of the said book, or shall forcibly prevent the reading of it, or cause any other service to be used in its stead, he shall forfeit, for the first offence, an hundred marks; for the second, four hundred; and for the third, shall forfeit all his goods and chattels, and suffer imprisonment for life.

NONCONFORMITY to the worship of the church is the other or negative branch of this offence.

Nonconformists are of two sorts: first, such as absent themselves from divine worship in the established church through total irreligion, and attend the service of no other persuasion. These, by different statutes, forfeit one shilling to the poor every

Lord's day they so absent themselves, and 20*l.* to the king, if they continue such default for a month together. And if they keep an inmate thus irreligiously disposed in their houses, they forfeit 10*l.* per month.

The second species of non-conformists are those who offend through a mistaken or perverse zeal.

By the Toleration Act, however, 1 W. & M. c. 18. no penal laws extend to any Dissenters, other than Papists and such as deny the Trinity; provided, 1. That they take the oaths of allegiance and supremacy (or make a similar affirmation, being Quakers), and subscribe the declaration against Popery. 2. That they repair to some congregation certified to and registered in the court of the bishop or archdeacon, or at the county sessions. 3. That the doors of such meeting-house shall be unlocked, unbarred, and unbolted.

By the 52 Geo. III. c. 155. the acts of 18 & 14 Car. II. c. 1. the 17 Car. II. c. 2. and the 22 Car. II. c. 1. relating to Dissenters, are repealed; and it is enacted, that no congregation or assembly for religious worship of Protestants (at which there shall be present more than twenty persons, besides the immediate family and servants of the person in whose house or upon whose premises such meeting, congregation, or assembly shall be had) shall be permitted or allowed, unless duly certified and registered in the bishop or archdeacon's court, or at the general or quarter sessions of the peace, once a year. And every person who shall knowingly permit or suffer any such congregation or assembly to meet in any place occupied by him, until the same shall have been so certified, shall forfeit, for every time any such congregation or assembly shall meet, a sum not exceeding 20*l.* nor less than 20*s.* § 1, 2.

And every person who shall teach or preach in any congregation or assembly in any place, without the consent of the occupier thereof, shall forfeit for every such offence any sum not exceeding thirty pounds, nor less than forty shillings § 3.

Preachers and persons resorting to any religious assemblies duly certified under this act, are exempted from all penalties, in the same manner as persons are who have taken the oaths prescribed under the statute of 1 W. & M. intituled, "An act for exempting their majesties' Protestant subjects, dissenting from the church of England, from the penalties of certain laws." § 4.

The oaths and declarations prescribed by the 19 Geo. III. c. 44. intituled, "An act for the further relief of Protestant dissenting ministers and schoolmasters," are to be taken by all preachers, when required thereto by a magistrate, under a penalty of not more than 10*l.* nor less than 10*s.* for every time they preach: but no person is required to go more than five miles for such purpose. And any person may require a justice of the peace to administer such oaths and declaration, who is required to give the parties a certificate thereof, upon their paying a fee of 2*s.* 6*d.* § 5—8.

Preachers and teachers having taken the oaths, and not following or being engaged in any trade or business, or other profession,

occupation, or employment, for their livelihood, except that of a schoolmaster, are exempted from the civil services and offices specified in the act of 1 W. & M. and from being balloted to serve in the militia or local militia of the United Kingdom. § 9.

No meeting, assembly, or congregation, shall be had in any place with the door locked, bolted, or barred, or otherwise fastened, under the penalty of a sum not exceeding 20*l.* nor less than 40*s.* to be paid by the preacher. § 11.

If any person or persons do and shall wilfully and maliciously, or contemptuously, disquiet or disturb any meeting, assembly, or congregation of persons assembled for religious worship, permitted or authorized by this act or any former act or acts of parliament, or shall in any way disturb, molest, or misuse any preacher, teacher, or person officiating at such meeting, assembly, or congregation, or any person or persons there assembled, such person or persons so offending, shall find two sureties to be bound by recognizances in the penal sum of 50*l.* to answer for such offence, and in default of such sureties shall be committed to prison; there to remain till the next general or quarter sessions; and upon conviction of the said offence at the said general or quarter sessions, shall suffer the pain and penalty of 40*l.* § 12.

Roman Catholics.—In order to shew the difference between the laws affecting Roman Catholics as they formerly stood and as they now exist, it will be necessary to enumerate those that were in force against them. Persons professing the Popish religion, besides the former penalties for not frequenting their parish church, were disabled from taking their lands, either by descent or purchase, after eighteen years of age, until they renounced their errors; they were required at the age of twenty-one to register their estates, and all future conveyances and wills relating to them; they were incapable of presenting to any advowson, or granting to any other person any avoidance of the same; they could not keep or teach any school, under pain of perpetual imprisonment; and if they willingly said or heard mass, they forfeited, the one two hundred, the other one hundred marks, and suffered a year's imprisonment for each offence. If any person sent another abroad to be educated in the Popish religion, or to reside in any religious house abroad for that purpose, or contributed to their maintenance when there, both the sender, the sent, and the contributory were disabled to sue in law or equity, to be executor or administrator to any person, to take any legacy or deed of gift, and to bear any office in the realm, and were to forfeit all their goods and chattels, and likewise all their real estate for life. And where these errors were aggravated by apostacy or perversion, where a person reconciled to the see of Rome, or procured others to be reconciled, the offence amounted to high treason. Popish recusants, convicted in a court of law of not attending the service of the church of England, were subject to the following disabilities, penalties, and forfeitures, over and above those before mentioned. They were considered as persons excommunicated; they could hold no office or

employment; they could not keep arms in their houses, but the same might be seized by the justices of the peace; they could not come within ten miles of London, on pain of 100*l.*; they could bring no action at law, or suit in equity; they were not permitted to travel above five miles from home, unless by licence, upon pain of forfeiting all their goods; and they could not come to court upon pain of 100*l.* No marriage or burial of such recusant, or baptism of his child, could be had otherwise than by the ministers of the church of England, under other severe penalties. A married woman, when recusant, forfeited two thirds of her dower or jointure; she could not be executrix or administratrix to her husband, nor have any part of his goods; and, during the coverture, might be kept in prison, unless her husband redeemed her at the rate of 10*l.* per month, or the third part of all his lands. And, lastly, as a feme-covert recusant might be imprisoned, so all others were required, within three months after conviction, either to submit and renounce their errors, or, if required so to do by four justices, abjure and renounce the realm: and if they did not depart, or if they returned without the king's licence, they were guilty of felony without benefit of clergy. There was also an inferior species of recusancy, refusing to make the declaration against Popery enjoined by the 30 Car. II. stat. 2. when tendered by the proper magistrate, which, if the party resided within ten miles of London, made him an absolute recusant convict; or, if at a greater distance, suspended him from having any seat in parliament, keeping arms in his house, or any horse above the value of five pounds. But Popish priests were in a still more dangerous condition. For, by the 11 & 12 W. III. c. 4. Popish priests or bishops celebrating mass, or exercising any part of their functions in England, except in the houses of ambassadors, were liable to perpetual imprisonment. And, by the 27 Eliz. c. 2. any Popish priest, born in the dominions of the crown of England, who shall come over hither from beyond sea (unless driven by stress of weather, and tarrying only a reasonable time), or shall be in England three days without conforming and taking the oaths, was guilty of high treason: and all persons harbouring him were guilty of felony without benefit of clergy.

But, by the 18 Geo. III. c. 60. with regard to such Papists as duly take the oath therein prescribed, of allegiance to his majesty, abjuration of the Pretender, renunciation of the Pope's civil power, and abhorrence of the doctrines of destroying and not keeping faith with heretics, and deposing or murdering princes excommunicated by the authority of the see of Rome, the act of the 11 & 12 W. III. is repealed so far as it disables them from purchasing or inheriting, or authorizes the apprehending or prosecuting the Popish clergy, or subjects to perpetual imprisonment either them or any teachers of youth.

And now, by the 31 Geo. III. c. 32. which may be called the Toleration Act of the Roman Catholics, all the severe and cruel restrictions and penalties are removed from those Roman Catholics

who are willing to comply with the requisitions of that statute; which are, that they must appear at some of the courts at Westminster, or at the quarter sessions held for the county, city, or place where they shall reside, and shall make and subscribe a declaration that they profess the Roman Catholic religion, and also an oath similar to that before mentioned. Of this declaration and oath being duly made by any Roman Catholic, the officer of the court shall grant him a certificate; and such officer shall yearly transmit to the privy council lists of all persons who have thus qualified themselves within a year in his respective court. The statute then provides, that a Roman Catholic thus qualified shall not be prosecuted under any statute for not repairing to a parish church; nor shall he be prosecuted for being a Papist, nor for attending or performing mass or other ceremonies of the church of Rome: provided, that no place shall be allowed for an assembly to celebrate such worship, until it is certified to the sessions; nor shall any minister officiate in it, until his name and description are recorded there. And no such place of assembly shall have its doors locked or barred during the time of meeting or divine worship.

If any Roman Catholic whatever is elected constable, churchwarden, overseer, or into any parochial office, he may execute the same by a deputy, to be approved as if he were to act for himself as principal. But every minister, who has qualified, shall be exempt from serving upon juries, and from being elected into any parochial office. And all the laws for frequenting divine service on Sundays shall continue in force, except where persons attend some place of worship allowed by this statute or the Toleration Act of the Dissenters.

But no Roman Catholic minister shall officiate in any place of worship having a steeple and a bell, or at any funeral in a church or church-yard, or shall wear the habits of his order, except in a place allowed by this statute, or in a private house, where there shall not be more than five persons besides the family. This statute shall not exempt Roman Catholics from the payment of tithes or other dues to the church; nor shall it affect the statutes concerning marriages, or any law respecting the succession to the crown. No person who has qualified shall be prosecuted for instructing youth, except in an endowed school, or a school in one of the English universities; and except also that no Roman Catholic schoolmaster shall receive into his school the child of any Protestant father: nor shall any Roman Catholic keep a school, until his or her name be recorded as a teacher at the sessions.

But no religious order is to be established; and every endowment of a school or college by a Roman Catholic shall still be superstitious and unlawful. And no person henceforth shall be summoned to take the oath of supremacy, and the declaration against transubstantiation. Nor shall Roman Catholics who have qualified be removeable from London and Westminster; neither shall any peer who has qualified be punishable for coming into the presence or palace of the king or queen. And no Papists

whatever shall be any longer obliged to register their names and estates, or enroll their deeds and wills. And every Roman Catholic who has qualified may be permitted to act as a barrister, attorney, and notary.

The Roman Catholics cannot sit in either house of parliament, because every member of parliament must take the oath of supremacy, and repeat and subscribe the declaration against transubstantiation. Nor can they vote at elections for the members of the house of commons, because, before they vote, they must take the oath of supremacy.

But the Roman Catholics in Ireland are permitted to vote at elections, but they cannot sit in either house of parliament.

A bequest, or disposition, for the purpose of educating children in the Roman Catholic religion, is unlawful. But the fund will not pass to the testator's next of kin, but it shall be applied to such charitable purposes as his majesty shall please to direct by his sign manual.

In order the better to secure the established church, there are two bulwarks erected, called the Corporation and Test Acts. By the former of these, no person can be legally elected to any office relating to the government of any city or corporation, unless within a twelvemonth before he has received the sacrament of the Lord's Supper, according to the rights of the Church of England; and he is also enjoined to take the oaths of allegiance and supremacy at the same time that he takes the oath of office; or, in default of either of these requisites, such election shall be void. The other, called the Test Act, directs all officers civil and military to take the oaths, and make the declaration against transubstantiation, in any of the king's courts at Westminster, or at the quarter sessions, within six calendar months after their admission; and also, within the same time, to receive the sacrament of the Lord's Supper, according to the usage of the church of England, in some public church immediately after divine service and sermon, and to deliver into court a certificate thereof signed by the minister and churchwarden, and also to prove the same by two credible witnesses, upon forfeiture of 500*l.* and disability to hold the said office. But, before the end of every session of parliament, an act is passed to indemnify all persons who have not complied with the requisitions of the Corporation and Test Acts, provided they qualify themselves within a time specified in the act; and provided also, that judgment in any action or prosecution has not been obtained against them for their former omission.

Another species of offences, more immediately against God and religion, is that of **BLASPHEMY** against the Almighty, by denying his being or providence, or by contumelious reproaches of our Saviour. Whither also may be referred all profane scoffing at the holy scriptures, or exposing them to contempt and ridicule. These are offences punishable at common law by fine and imprisonment, or other infamous corporeal punishments.

Somewhat allied to this is the offence of **CURSING** and **SWEARING**. By the 19 Geo. II. c. 21. every labourer, sailor, or soldier,

profanely cursing or swearing, shall forfeit 1*s.*; every other person under the degree of a gentleman, 2*s.*; and every gentleman, or person of superior rank, 5*s.* to the poor of the parish; and on the second conviction, double; and for every subsequent offence, treble the sum first forfeited; with all charges of conviction; and in default of payment, shall be sent to the house of correction for ten days.

Besides this punishment for taking God's name in vain in common discourse, it is enacted by the same statute, that if in any stage play, interlude, or show, the name of the Holy Trinity, or any of the persons therein, be jestingly or profanely used, the offender shall forfeit 10*l.* one moiety to the king, and the other to the informer.

Another species of offence against God and religion is the offence of WITCHCRAFT, CONJURATION, ENCHANTMENT, or SORCERY; against which it is enacted, by the 9 Geo. II. c. 5. that any person pretending to use witchcraft, tell fortunes, or discover stolen goods by skill in the occult sciences, shall be punished with a year's imprisonment, and be liable to be fined at the discretion of the court.

Another species of offenders in this class are all RELIGIOUS IMPOSTORS. These are punishable with fine, imprisonment, and infamous corporeal punishment.

SIMONY.

Simony is a corrupt presentation to an ecclesiastical benefice for gift or reward. By the 31 Eliz. c. 6. if any patron, for money or any other corrupt consideration or promise, directly or indirectly given, shall present, admit, institute, induct, install, or collate any person to an ecclesiastical benefice or dignity, both the giver and taker shall forfeit two years value of the benefice or dignity; one moiety to the king, and the other to any one who will sue for the same.

Also by the same statute, if persons also corruptly resign or exchange their benefices, both the giver and taker shall in like manner forfeit double the value of the money, or other corrupt consideration. And persons who shall corruptly ordain or license any minister, or procure him to be ordained or licensed shall incur a forfeiture of 40*l.* and the minister himself 10*l.* besides being incapable of holding any ecclesiastical preferment for seven years afterwards. Corrupt elections and resignations in colleges, hospitals, and other eleemosynary corporations, are also punished by the same statute, with forfeiture of the double value, vacating the place or office, and a devolution of the right of election for that turn to the crown.

SABBATH-BREAKING.

Profanation of the Lord's-day is punished by the municipal law of England. By the 27 Hen. VI. c. 4. no fair or market shall be held on the principal festivals, Good Friday, or any Sunday (except the four Sundays in harvest) on pain of forfeiting the goods exposed to sale. And by the 1 Car. I. c. 1. no person shall as-

semble out of their own parishes for any sport whatsoever upon this day; nor, in their parishes, shall use any bull or bear-baiting, interludes, plays, or other *unlawful* exercises or pastimes; on pain that every offender shall pay 3s. 4d. to the poor. Also, by the 29 Car. II. c. 7. no person is allowed to *work* on the Lord's day, or use any boat or barge, or expose any goods to sale (except meat in public houses, milk at certain hours, and works of necessity or charity), on forfeiture of 5s. Nor shall any drover, carrier, or the like, travel upon that day, under pain of 20s. Goods exposed to sale upon a Sunday, are forfeited to the use of the poor, except that one-third may be allowed the informer. But milk may be sold before nine in the morning, and after four in the afternoon. Mackarel may also be sold on Sundays before and after divine service.

Forty watermen are permitted to ply upon the Thames betwixt Vauxhall and Limehouse on Sundays. Fish carriages are also allowed to travel on Sundays, either laden or returning empty.

Persons exercising their calling on a Sunday are only subject to one penalty; for the whole is but one offence, or one act of exercising, though continued the whole day.

Bakers are permitted to dress dinners on a Sunday, as a work of necessity. But by the 31 Geo. III. c. 61. every baker shall be subject to a penalty of 10s. to the use of the poor, for exercising his business in any manner as a baker, except that he may sell bread between nine o'clock in the morning and one in the afternoon; and may also, within that time, bake meat, puddings, and pies, for any person who shall carry or send the same to be baked. By the 29 Car. II. c. 7. no writ, process, or warrant, except in treason, felony, or breach of the peace, shall be served on a Sunday, on pain that the same shall be void; and the party serving the same shall be liable to an action for damages.

Also by the 13 Geo. III. c. 49. no person shall, on a Sunday or Christmas day, kill any game, or use any gun, dog, net, or engine, for that purpose; on pain of forfeiting from ten to twenty pounds for the first offence; and from twenty to thirty for the second.

And by the 21 Geo. III. c. 49. if a house, room, or place, is opened on a Sunday, for any public entertainment, or for debating upon any subject whatever, to which persons are admitted by money or tickets, the keeper of it shall forfeit 200l. to any person who will prosecute; the manager or president, 100l.; and the receiver of the money or tickets, 50l. And any person advertising such a meeting forfeits 50l. for every offence.

DRUNKENNESS is punished, by the 4 Jac. I. c. 5. with the forfeiture of 5s. or the sitting two hours in the stocks.

LEWDNESS.

Another offence against religion and morality, is that of open and notorious lewdness, either by frequenting houses of ill fame, which is an indictable offence, or by some grossly scandalous and public indecency; for which the punishment is by fine and imprisonment.

Having BASTARD CHILDREN may also be considered in a criminal light. By the 18 Eliz. c. 3. two justices may make

order for the punishment of the mother and reputed father. And by the 7 Jac. I. c. 4. a specific punishment (*viz.* commitment to the house of correction) is inflicted on the woman only. But, in both cases, the penalty can only be inflicted if the bastard becomes chargeable to the parish. By the last-mentioned statute the justices may commit the mother to the house of correction, there to be punished and set to work for one year; and, in case of a second offence, till she find sureties never to offend again.

CHAPTER III.

Offences against the Law of Nations.

OFFENCES against the law of nations are of three kinds: 1. Violation of safe-conducts; 2. Infringement of the rights of ambassadors; and, 3. Piracy.

VIOLATION OF SAFE-CONDUCTS, OR PASSPORTS.

By the 31 Hen. VI. c. 4. it is enacted, that if any of the king's subjects attempt or offend, upon the sea, or in any port within the king's obeisance, against any stranger in amity, league, or truce, or under safe-conduct; or especially by attacking his person, or spoiling him, or robbing him of his goods; the lord chancellor, with any of the justices of either the King's Bench or Common Pleas, may cause full restitution and amends to be made to the party injured.

INFRINGEMENT OF THE RIGHTS OF AMBASSADORS.

The common law of England fully protects the rights of ambassadors: but these rights are still more enforced by the 7 Ann. c. 12. which enacts, that all process whereby the person of any ambassador, or his domestic, or domestic servant, may be arrested, or his goods distrained or seized, shall be utterly null and void; and that all persons prosecuting, soliciting, or executing such process, being convicted, by confession or the oath of one witness, before the lord chancellor and the chief justices, or any two of them, shall be deemed violators of the law of nations, and disturbers of the public repose; and shall suffer such penalties and corporal punishment as the said judges, or any two of them, shall think fit.

PIRACY.

The offence of piracy, by common law, consists in committing those acts of robbery and depredation upon the high seas, which if committed upon land would have amounted to felony there. But, by statute, some other offences are made piracy also; as by the 11 & 12 W. III. c. 7. if any natural-born subject commit any act of hostility upon the high seas against other of his majesty's subjects under colour of a commission from any foreign power, this

though it would only be an act of war in an alien, shall be construed piracy in a subject. And further, any commander or other seafaring person, betraying his trust, and running away with any ship, boat, ordnance, ammunition, or goods, or yielding them up voluntarily to a pirate, or conspiring to do these acts; or any person assaulting the commander of a vessel, to hinder him from fighting in defence of his ship, or confining him, or making or endeavouring to make a revolt on board; shall be adjudged a pirate, felon, and robber, and shall suffer death, whether he be principal, or merely accessory, by setting forth such pirates or abetting them before the fact, or receiving or concealing them or their goods after it. And the 4 Geo. I. c. 11. expressly excludes the principals from the benefit of clergy.

By the 8 Geo. I. c. 24. the trading with known pirates or furnishing them with stores or ammunition, or fitting out any vessel for that purpose, or in anywise consulting, combining, confederating, or corresponding with them; or the forcibly boarding any merchant vessel, though without seizing or carrying her off, and destroying or throwing any of the goods overboard, shall be deemed piracy; and such accessories to piracy as are described by the statute of King William are declared to be principal parties; and all parties convicted by virtue of this act are made felons without benefit of clergy.

By the same statute also (to encourage the defence of merchant vessels against pirates) the commanders or seamen wounded, and the widows of such seamen as are slain, in any piratical engagement, shall be entitled to a bounty, to be divided among them, not exceeding one-fiftieth part of the value of the cargo on board; and such wounded seamen shall be entitled to the pension of Greenwich Hospital. And if the commander shall behave cowardly, by not defending the ship, if she carry guns or arms, or shall discharge the mariners from fighting, so that the ship falls into the hands of pirates, such commander shall forfeit all his wages, and suffer six months imprisonment.

By the 18 Geo. II. c. 30. any natural-born subject or denizen, who in time of war shall commit hostilities at sea against any of his fellow-subjects, or shall assist an enemy on that element, is liable to be tried and convicted as a pirate.

By the 5 Geo. IV. c. 17. if any subject of his majesty, or any person within any of the dominions, forts, settlements, factories, or territories in his majesty's possession, or under the government of the East India Company, shall (except in such cases as are by law permitted), after the 1st of January 1825, upon the high seas, or in any haven, river, creek, or place where the Admiralty has jurisdiction, knowingly and wilfully carry away, convey, or remove, or aid and assist in so doing, any person or persons as a slave or slaves, or for the purpose of being imported as slaves into any island, colony, country, territory, or place whatsoever, or of being sold, transferred, used, or dealt with as slaves, or shall ship, embark, receive, detain, or confine, or assist in so doing, on board

any ship, vessel, or boat, any person or persons for the purpose of their being carried away or removed as slaves, or of being imported as slaves into any place whatsoever, or of being sold, transferred, used, or dealt with as slaves, the person or persons so offending shall be deemed guilty of piracy, felony, and robbery, and shall suffer death without benefit of clergy, and loss of lands, goods, and chattels. § 1.

But nothing in this act shall be construed to repeal or alter the provisions in any other act, imposing forfeitures and penalties upon the same offences, or the remedies given for the recovery thereof; nor to repeal or alter any of the enactments or provisions of the 51 Geo. III. c. 23. intituled, "*An act for rendering more effectual the 47 Geo. III. intituled, 'An act for the abolition of the slave trade;'*" except so far as such enactments are altered or varied by this act.

The offences hereinbefore specified may be inquired of, either according to the ordinary course of law, and of the 28 Hen. VIII. c. 15. intituled, "*An act for pirates,*" or according to the 46 Geo. III. c. 54. intituled, "*An act for the more speedy trial of offences committed in distant parts upon the high seas.*" § 3.

CHAPTER IV.

Of High Treason.

TREASON is defined to be an offence committed against the security of the king and kingdom.

In high treason there are no accessaries, but all are principals.

The 25 Edw. III. has accurately defined the crime of high treason, which was, before the passing of that act, very uncertain in its construction. The treasons by this statute may be considered as follows: — 1. High treason against the king and queen's person; 2. Treason in levying war against the king in his realm; 3. Adhering to his enemies within the realm, or aiding them elsewhere; 4. Violating or deflowering the queen, or the king's eldest daughter; 5. Counterfeiting the king's great or privy seal, or his money; and, 6. Slaying the judges in the execution of their offices.

1. *To compass or imagine the death of the king,* queen, or their eldest son and heir, is high treason; though it must be manifested by some overt act; as by providing arms to do it; consulting to levy war against him; writing letters to excite others to join*

* The law applies to the king in possession, without any respect to his title; for it is held that a king *de facto*, and not *de jure*, is a king within the meaning of the act.

therein; assembling persons in order to imprison or depose the king, or to get him into their power: these acts are sufficient to prove the compassing or imagining the death of the king, and to make a man guilty of high treason.

It hath been adjudged that words are an overt act of high treason. Such deliberate words as shew a direct purpose against the king's life, will amount to an overt act of compassing or imagining the king's death; for as the compassing or imagining the death of the king is the treason, words are the most natural way of expressing the imagination of the heart, and may be good evidence of it; and any external act, which may be a manifestation of such imagination, is an overt act. But if words are set down in writing, and kept privately in a man's closet, they are no overt act of treason, except the words are published.

And it is held that he who intends by force to prescribe laws to the king, and to restrain him of his power, intends to deprive him of his crown and life. That if a man be ignorant of the intention of those who take up arms against the king, if he join in any action with them, he is guilty of treason. And that the law judges every rebellion to be a plot against the king's life.

2. *To levy war against the king in his realm* is high treason, both by the statute of Edw. III. as well as the common law. But as, in cases of treason, there must be an overt act, a conspiracy or compassing to levy war is no overt act, unless a war be actually levied; though if a war be levied, then the conspirators are all traitors, although they are not in arms. And a conspiracy to levy war will be evidence of an overt act for compassing the king's death: but if the charge in an indictment be for levying war only, it must be proved that a war was levied, to bring the prisoner under this clause of the statute.

Persons raising forces for any public end or purpose, and putting themselves in a posture of war, by choosing leaders, and resisting the constituted authorities, is high treason. And those who make an insurrection in order to redress a public grievance, whether it be a real or pretended one, are held to levy war against the king, though they have no direct design against his person.

Where great numbers by force endeavour to remove certain persons from the king, or to lay violent hands on a privy-councillor, or revenge themselves against a magistrate for executing his office, or to deliver men out of prison, or reform religion or the law, to pull down all bawdy houses, or throw down all inclosures in general; these acts will be high treason. But where a number of men rise to remove a grievance to their private interest, as to pull down a particular inclosure, &c. they are only considered as rioters.

If two or more conspire to levy war, and one of them alone raise forces; this is adjudged treason in all. And not only such as directly rebel and take up arms against the king, but also those who in a violent manner withstand his lawful authority, or attempt

a reformation of his government, levy war against him; and therefore, to hold a fort or castle against the king's forces, to keep together armed men in great numbers, against the king's express commands, is high treason.

But if, where a rebellion is broke out, persons join themselves to rebels for fear of death, and return the first opportunity, they are not guilty of this offence.

3. *To adhere to the king's enemies within his realm, or give them aid in the realm, or elsewhere, is high treason.* Here adherence may be proved by giving the king's enemies comfort or relief, or being in counsel with others to levy any seditious wars; and the delivery or surrender of any of the king's castles or forts to his enemy, within the realm or without, for reward, is an adhering to the king's enemies, and high treason by the statute.

It has been adjudged, that adhering to the king's enemies is an adhering against him; and this adhering to his enemies out of the realm is treason. A person beyond sea having solicited a foreign prince to invade the kingdom, was held guilty of high treason. But adherence out of the realm must be alleged in some place in England.

A person knowing that another had committed treason, and not revealing it, so that the offender might be secured, was considered guilty of high treason by the common law: but there must now be an assent to some outward act, to make concealing it treason.

4. *To violate and deflower the king's wife, or eldest daughter unmarried, or the wife of the king's eldest son, is treason within the statute.*

Not only violating the queen consort is high treason, but also her yielding and consenting to it, is treason in her: but this doth not extend to a queen dowager. So likewise violating the wife of the prince is treason only during the marriage. And the eldest daughter of the king is such a daughter as is eldest, not married, at the time of the violation; which will be treason, although there *was* an elder daughter than her, who died without issue; for now the elder alive has a right to the inheritance of the crown upon a failure of issue male.

The treason against the queen's life, mentioned in the statute, must be also during the coverture, and not when dowager queen.

5. *To counterfeit the king's great seal, privy seal, or his money; or bring false money into this kingdom counterfeited like the money of England; to make payment therewith, in deceit of the king and his people; these are high treason by the statute,*

As to counterfeiting the king's seal, it was treason by the common law. The 25 Edw. III. mentions only the great seal and privy seal; therefore the counterfeiting of the sign manual is not treason within that act. By the 1 & 2 P. & M. c. 11. those who aid and consent to the counterfeiting of the great seal are equally guilty with the actors: but an intent or going about to counterfeit the great seal, if it be not actually done, is not treason; there must be an actual counterfeiting.

The fixing the great seal to a patent without warrant, or erasing any thing out of a patent and adding new matter therein, or taking off the wax impressed by the great seal from one patent and fixing it to another, are not within this law.

At common law, forging the king's money was treason; as counterfeiting it is by the 25 Edw. III. And forging or counterfeiting foreign money made current here by proclamation is likewise high treason by the 1 Mar. st. 2. c. 6. And as those persons that coin money without the king's authority are guilty of treason; so are those who have authority to do it, if they make it of greater alloy or less weight than they ought. In case of bringing counterfeit money into this kingdom, it must be actually counterfeited according to the likeness of English money, and is to be knowingly brought over from some foreign nation, not from any place subject to the crown of England, and must be uttered in payment.

6. If a man *slay the chancellor, treasurer, or the king's justices* of the one bench or the other, justices in eyre, or justices of assize, and all other justices assigned to hear and determine, being in their places doing their offices, such person is guilty of high treason.

As this clause of the act only extends to the persons therein described, the barons of the Exchequer do not come within its protection: but by 5 Eliz. c. 18. and 1 W. & M. c. 21. the lord keeper or commissioners of the great seal do.

The crimes constituting treason not comprehended under the 25 Edw. III. are—

First, Those relating to *Papists*, which we have before considered among the penalties incurred by that branch of non-conformists to the national church.

Secondly, Those with regard to treasons relative to the *coin* or other *royal signatures*. The only two offences respecting the first, which are made treason by the 25 Edw. III. are, the actual counterfeiting the gold and silver coin of this kingdom; or the importing such counterfeit money with intent to utter it, knowing it to be false. But these not being found sufficient to restrain the evil, the following statutes have since been passed:—

By the 1 Mar. st. 2. c. 6. if any person falsely forge or counterfeit any such kind of coin of gold or silver as is not the proper coin of the realm, but shall be current within this realm by consent of the crown; or shall falsely forge or counterfeit the sign manual, privy signet, or privy seal; such offences shall be deemed high treason.

By the 1 & 2 P. & M. c. 11. if any person bring into this realm such false or counterfeit foreign money, being current here, knowing the same to be false, with intent to utter the same in payment, they shall be deemed guilty of high treason.

By the 5 Eliz. c. 11. clipping, washing, rounding, or filing, for wicked gain's sake, any of the money of this realm, or other money suffered to be current here, shall be adjudged high treason;

and by the 18 Eliz. c. 1. the same species of offence is described in other more general words, *viz.* impairing, diminishing, falsifying, scaling, and lightening, and made liable to the same penalties.

By the 8 & 9 W. III. c. 26. made perpetual by the 7 Ann. c. 25. whoever, without proper authority, shall knowingly make or amend, or assist in so doing, or shall buy, sell, conceal, hide, or knowingly have in his possession, any implements of coinage specified in the act, or other tools or instruments proper only for the coinage of money; or shall convey the same out of the king's Mint; he, together with his counsellors, procurers, aiders, and abettors, shall be guilty of high treason. And to mark any coin on the edges with letters, or otherwise, in imitation of those used in the Mint; or to colour, gild, or case over any coin resembling the current coin, or even round blanks of base metal; shall be construed high treason. But all prosecutions on this act are to be commenced within three months after the commission of the offence; except those for making or amending any coining tool or instrument, or for marking money round the edges, which are to be commenced within six months after the offence committed.

Lastly, by the 15 & 16 Geo. III. c. 28. if any person colour or alter any shilling or sixpence, either lawful or counterfeit, to make them respectively resemble a guinea or half-guinea, or any halfpenny or farthing, to make them respectively resemble a shilling or sixpence; this is also high treason: but the offender shall be pardoned, in case (being out of prison) he discover and convict two other offenders of the same kind.

Thirdly, Such as are created for the security of the *Protestant succession*. By the 1 Ann. st. 2. c. 17. if any person shall endeavour to deprive or hinder any person, being the next in succession to the crown according to the Act of Settlement, from succeeding to the crown, and shall maliciously and directly attempt the same by any overt act, such offence shall be high treason. And, by the 6 Ann. c. 7. if any person shall maliciously, advisedly, and directly, by writing or printing, maintain and affirm, that any other person hath any right or title to the crown of this realm, otherwise than according to the Act of Settlement; or that the kings of this realm, with the authority of parliament, are not able to make laws and statutes to bind the crown, and the descent thereof; such person shall be guilty of high treason.

By the 36 Geo. III. c. 7. if any person, during the life of his Majesty, and until the end of the next session of parliament after a demise of the crown, shall compass, imagine, invent, devise, or intend death and destruction, or any bodily harm tending to destruction, maim or wounding, imprisonment or restraint, of the king, his heirs and successors, or to depose him or them, or to levy war in order to compel a change of measures or counsels, or in order to put any force or constraint upon, or to intimidate or overawe either house of parliament, or to move or stir any foreigner or stranger with force to invade this realm, or any other his majesty's dominions; and such compassing, &c. shall express by

publishing any printing or writing, or by any overt act or deed; such person shall be adjudged to be a traitor, and shall suffer death.

By the 57 Geo. III. c. 6. if any person or persons, during the period in which his Royal Highness the Prince of Wales shall remain in the personal exercise of the royal authority, shall, within the realm or without, compass, imagine, invent, devise, or intend death or destruction, or any bodily harm tending to death or destruction, maim or wounding, imprisonment or restraint, of the person of his Royal Highness, and such compassings, imaginations, inventions, devices, intentions, or any of them, shall express, utter, or declare by publishing any printing or writing, or by any overt act or deed, being legally convicted thereof upon the oaths of two lawful and credible witnesses, upon trial or otherwise, convicted or attainted by due course of law, then every such person or persons so offending shall be adjudged to be a traitor and traitors, and shall suffer pain of death, and also lose and forfeit as in cases of high treason.* The clauses of the act of the 39 & 40 Geo. III. c. 93. intituled, "An act for regulating trials for high treason and misprision of treason in certain cases," are extended to this act.

In cases of high treason whereby corruption of blood may ensue (except treason in counterfeiting the king's coin or seals, or misprision of such treason), it is enacted by the 7 W. III. c. 3. first, that no person shall be tried for any such treason, except an attempt to assassinate the king, unless the indictment be found within three years after the offence committed; next, that the prisoner shall have a copy of the indictment (which includes the caption, but not the names of the witnesses) five days at least before the trial, that is, upon the true construction of the act, before his arraignment; for then is his time to take any exceptions thereto, by way of plea or demurrer; thirdly, that he shall have a copy of the panel of jurors two days before his trial; and lastly, that he shall have the same compulsive process to bring in his witnesses for him as was usual to compel the appearance against him.

And by the 7 Ann. c. 21. (which did not take place till after the decease of the Pretender) all persons indicted for high treason or misprision of treason shall have, not only a copy of the indictment, but a list of all the witnesses to be produced, and of the jurors impannelled, with their professions and places of abode, delivered to him ten days before the trial, and in the presence of two witnesses,† the better to prepare him to make his challenges and defence. But this last act, so far as it affected indictments for the inferior species of high treason, respecting the coin and the royal seals, is repealed by the 6 Geo. III. c. 53.

* As this act was intended to protect his Royal Highness the Prince of Wales during his exercise of the royal authority, it of course expired with the occasion which gave it birth; but there is little doubt that it will be re-enacted should the government be again invested in a similar personage.

† It is a practice to deliver a copy of the indictment, and the lists of witnesses and jurors, ten clear days, exclusive of the day of delivery and the day of trial, and of intervening Sundays previous to the trial. *Fost.* 2. 250.

By the 39 & 40 Geo. III. c. 93. it is enacted, that in all cases of high treason, in compassing or imagining the death of the king, or in misprision of such treason, where the overt act of such treason shall be alleged in the indictment to be the assassinating of the king, or a direct attempt against his life or person, the person accused shall be indicted and tried in the same manner in every respect, and upon the like evidence, as if he was charged with murder. But the judgment and execution shall remain the same as in other cases of high treason.

All persons charged with the crime of high treason shall have two counsel allowed them by the court; and the same privilege is allowed them upon an impeachment by the House of Commons: and they cannot be attainted, but upon the oath of two witnesses, either both to the same overt act, or one of them to one, and the other to another overt act of the same treason.

CHAPTER V.

Of Felonies against the Royal Prerogative.

FELONY, in general, signifies every species of crime which occasioned, at common law, the forfeiture of goods and lands. We shall first consider those immediately injurious to the royal prerogative.

These are, 1. Offences relative to the coinage, not amounting to high treason; 2. Offences against the privy council; 3. The offence of serving foreign states; 4. The embezzling or destroying the king's armour or warlike stores; 5. Desertion from the army or navy in time of war; and, 6. The seduction of soldiers or sailors, and the administering or taking unlawful oaths.

OFFENCES RELATIVE TO THE COINAGE.

The offences relative to the coinage, under which may be ranked some inferior misdemeanors not amounting to felony, or high treason, are thus declared by a series of statutes, which we shall recite in the order of time they were enacted.

First, by the 27 Edw. I. c. 3. none shall bring pollards and crockards, which were foreign coins of base metal, into the realm, on pain of forfeiture of life and goods.

By the 17 Edw. III. none shall be so hardy as to bring false and ill money into the realm, on pain of forfeiture of life and member by the persons importing, and the searchers permitting such importation.

By the 3 Hen. V. st. 1. to make, coin, buy, or bring into the realm, any gally halfpence, suskins, or dotkins, in order to utter them, is felony; and knowingly to receive or pay either them or blanks, is forfeiture of one hundred shillings.

By the 14 Eliz. c. 3. such as forge any foreign coin, although it be not made current here by proclamation, shall (with their aiders and abettors) be guilty of misprision of treason.

By the 6 & 7 W. III. c. 7. if any person buy or sell, or knowingly have in his custody, any clippings or filings of the coin, he shall forfeit the same, and 500*l*. (one moiety to the king, and the other to the informer), and be branded in the cheek with the letter R.

By the 8 & 9 W. III. c. 26. if any person shall blanch or whiten copper for sale (which makes it resemble silver); or buy or sell, or offer to sale, any malleable composition, which shall be heavier than silver, and look, touch, and wear like gold, but be beneath the standard; or if any person shall receive or pay, at a less rate than it imports to be of, any counterfeit or diminished milled money of this kingdom, not being cut in pieces (an operation which is expressly directed to be performed when such money is produced in evidence, and which any person, to whom any gold or silver money is tendered, is empowered by the 9 & 10 W. III. c. 21. 13 Geo. III. c. 71. and 14 Geo. III. c. 70. to perform at his own hazard, and the officers of the Exchequer, and receivers-general of the taxes, are particularly required to perform); all such persons shall be guilty of felony, and may be prosecuted for the same at any time within three months after the offence committed.

But these precautions not being found sufficient to prevent the uttering of false or diminished money, which was only a misdemeanor at common law, it is enacted by the 15 & 16 Geo. II. c. 28. that if any person shall utter or tender in payment any counterfeit coin, knowing it so to be, he shall for the first offence be imprisoned six months, and find sureties for his good behaviour six months more; for the second offence, shall be imprisoned two years, and find sureties for two years longer; and for the third offence, shall be guilty of felony without benefit of clergy.

Also if a person knowingly tender in payment any counterfeit money, and at the same time have more in his custody; or shall, within ten days after, knowingly tender other false money; he shall be deemed a common utterer of counterfeit money, and shall for the first offence be imprisoned one year, and find sureties for his good behaviour for two years longer; and, for the second, be guilty of felony without benefit of clergy.

By the same statute it is also enacted, that if any person counterfeit the copper coin, he shall suffer two years imprisonment, and find sureties for two years more.

By the 11 Geo. III. c. 40. persons counterfeiting copper halfpence or farthings, with their abettors; or buying, selling, receiving, or putting off any counterfeit copper money (not cut in pieces, or melted down) at a less value than it imports to be of; shall be guilty of single felony. And by a temporary statute (14 Geo. III.

c. 42.) now made perpetual by the 39 Geo. III. c. 74. if any quantity of money, exceeding the sum of five pounds, being or purporting to be the silver coin of this realm, but below the standard of the Mint in weight or fineness, shall be imported into Great Britain or Ireland, the same shall be forfeited, in equal moieties, to the crown and prosecutor.

OFFENCES AGAINST THE PRIVY COUNCIL.

By the 3 Hen. VII. c. 14. if any sworn servant of the king's household conspire or confederate to kill any lord of this realm, or other person, sworn of the king's council, he shall be guilty of felony.

And, by the 9 Ann. c. 16. to assault, strike, wound, or attempt to kill, any privy councillor in the execution of his office, is made felony without benefit of clergy.

SERVING FOREIGN STATES.

By the 59 Geo. III. c. 69. if any natural-born subject of his majesty shall, after the 1st day of August, 1819, or out of the United Kingdom after the 1st day of November, 1819, take or accept any commission, or shall otherwise enter into the naval or military service of any foreign prince, state, potentate, or colony, province, or part of any province or people, or of any person or persons exercising or assuming to exercise the powers of government in or over any foreign country, colony, province, or part of any province or people, without the licence of his majesty under the sign manual, or signified by order of council, or by royal proclamation; or if any person whatever, within the dominions of Great Britain, shall hire, or attempt or endeavour to hire, retain, engage, or procure, any person or persons to enlist in the service of any power or powers, &c. as aforesaid; every person so offending shall be deemed guilty of a misdemeanor, and shall be punished by fine and imprisonment at the discretion of the court.

The officers of the customs are empowered, on information upon oath, to detain any ship or vessel in any port of his majesty's dominions having persons on board destined for the services as aforesaid. § 5.

And any master or other person having the command of any ship with persons engaged as aforesaid, with his knowledge and consent, shall forfeit 50*l.* for each person. § 6.

Any person fitting out and equipping any vessel without licence of his majesty, for the service of any power or powers as aforesaid, is declared guilty of a misdemeanor: and the ship, with all her stores, tackle, &c. becomes forfeited. § 7.

If any ship or vessel in the service of any of the powers, states, &c. aforesaid, shall be assisted by any person or persons in the dominions of Great Britain, without the licence of his majesty, by adding to the number of guns, or by the addition of any equipment of war, such person or persons so offending are declared guilty of a misdemeanor, and are liable to the punishment of fine and imprisonment.

This act does not subject to any penalty any person entering into the service of any prince, state, or potentate in Asia, with the leave or licence of the governor-general in council, or vice-president in council of Fort William in Bengal.

EMBEZZLING OR DESTROYING THE KING'S ARMOUR, OR WARLIKE STORES.

By the 31 Eliz. c. 4. if any person having the charge or custody of the king's armour, ordnance, ammunition, or habiliments of war, or of any victual provided for victualling the king's soldiers or mariners, shall, either for gain, or to impede his majesty's service, embezzle the same to the value of twenty shillings, such offence shall be felony. And the 22 Car. II. c. 5. takes away the benefit of clergy from this offence, and from stealing the king's naval stores to the value of twenty shillings; with a power for the judge, after sentence, to transport the offender for seven years.

But now by the 4 Geo. IV. c. 53. it is made transportation for life, or for any term not less than seven years, or to be imprisoned only, or to be imprisoned and kept to hard labour in the common gaol or house of correction, for any term not exceeding seven years.

Other inferior embezzlements and misdemeanors, that fall under this denomination, are punished by the 9 & 10 W. III. c. 41; 1 Geo. I. c. 25; 9 Geo. I. c. 8; and 17 Geo. II. c. 40. with fine, corporal punishment, and imprisonment. And by the 12 Geo. III. c. 24. to set on fire, burn, or destroy any of his majesty's ships of war, whether built, building, or repairing; or any of the king's arsenals, magazines, dock-yards, rope-yards, or victualling offices, or materials thereunto belonging; or military, naval, or victualling stores, or ammunition; or causing, aiding, procuring, abetting, or assisting in such offence; shall be felony without benefit of clergy.

DESERTION FROM THE ARMY OR NAVY.

Desertion in time of war, whether by land or sea, in England or in parts beyond the seas, is (exclusive of the annual acts of parliament for punishing mutiny and desertion), by the 18 Hen. VI. c. 19. and 5 Eliz. c. 5. made felony, but not without benefit of clergy. But by the 2 & 3 Edw. VI. c. 2. clergy is taken away from such deserters, and the offence is made triable by the justices of every shire.

SEDUCTION OF SOLDIERS OR SAILORS, AND ADMINISTERING OR TAKING UNLAWFUL OATHS.

By the 37 Geo. III. c. 70. if any person shall maliciously and advisedly endeavour to seduce any person serving in his majesty's service by sea or land from his duty and allegiance, or to incite any person to commit any act of mutiny or mutinous practice, he shall be guilty of felony, and shall suffer death without benefit of clergy. The crime, wherever committed, may be tried in any county.

And by the 37 Geo. III. c. 123. it is enacted, that whoever shall administer, or cause to be administered, or shall be present at and consenting to the administering of, or shall take, any oath or engagement intended to bind any person in any mutinous or seditious purpose, or to belong to any seditious society or confederacy, or to obey any committee, or any person not having legal authority for that purpose, or not to give evidence against any confederate or other person, or not to discover any unlawful combination, or any illegal act, or any illegal oath or engagement, shall be guilty of felony, and may be transported for seven years. Compulsion shall be no excuse, unless the party, within four days after he has an opportunity, disclose the whole of the case to a justice of the peace, or if a seaman or soldier, to his commanding officer. An offence against this act, committed any where, may be tried in any county; unless it be committed in Scotland, when it shall be tried in the criminal courts of that country.

A person acquitted under either of these statutes, shall not be prosecuted again for the same fact for high treason; but these statutes shall not prevent any person not already tried under them from being prosecuted for high treason, in the same manner as if they had not been passed.

CHAPTER VI.

Of Præmunire.

PRÆMUNIRE was an offence whereby the Papal authority was encouraged and promoted, in diminution of that of the crown. It derives its name from the word *præmunire*, *to forewarn*, in the writ by which the punishment was inflicted.

In the thirty-fifth year of Edward I. was made the first statute against the encroachments of the Pope, being the foundation of all the subsequent statutes of *præmunire*.

By the 27 Edw. III. c. 1. called the Statute of Provisors, it is enacted, that the court of Rome shall not present or collate to any bishopric or living in England; and that whoever disturbs any patron in the presentation to a living by virtue of a Papal provision, such provisor shall pay fine and ransom to the king at his will, and be imprisoned till he renounces such provision: and the same punishment is inflicted on such as cite the king, or any of his subjects, to answer in the court of Rome.

In the reign of Richard II. it was found necessary to strengthen these laws: and therefore it was enacted by the 3 Ric. II. c. 3. and 7 Ric. II. c. 12. first, that no alien should be capable of letting his benefice to farm; and afterwards, that no alien should be capable to be presented to any ecclesiastical preferment, under

the penalty of the statutes of provisors. By the 12 Ric. II. c. 15. all liegemen of the king accepting of a living by any foreign provision, are put out of the king's protection, and the benefice made void. To which the 13 Ric. II. st. 2. c. 2. adds banishment and forfeiture of lands and goods; and by cap. 3. of the same, any person bringing over any citation or excommunication from beyond sea, on account of the execution of the foregoing statutes of provisors, shall be imprisoned, forfeit his goods and lands, and moreover suffer pain of life and member.

The next statute which is generally referred to by all the subsequent statutes, is usually called the statute of *præmunire*; it is the 16 Ric. II. c. 5. which enacts, that whoever procures at Rome, or elsewhere, any translations, processes, excommunications, bulls, instruments, or other things which touch the king, against him, his crown, or realm, and all persons, aiding, and assisting therein, shall be put out of the king's protection, their lands and goods forfeited to the king's use, and they shall be attached by their bodies to answer to the king and his council; or process of *præmunire facias* shall be made out against them, as in other cases of provisors.

By the 2 Hen. IV. c. 3. all persons who accept any provision from the Pope to be exempt from canonical obedience to their proper ordinary, are also subjected to the penalties of *præmunire*.

And, by the several statutes of 24 Hen. VIII. c. 12. and 25 Hen. VIII. c. 19 & 31. to appeal to Rome from any of the king's courts, to sue to Rome for any licence of dispensation, or to obey any process from thence, are made liable to the pains of *præmunire*. And in order to restore to the king, in effect, the nomination of vacant bishoprics, and yet keep up the established forms, it is enacted, by 25 Hen. VIII. c. 20. that if the dean and chapter refuse to elect the person named by the king, or any archbishop or bishop to confirm or consecrate him, they shall fall within the penalties of the statute of *præmunire*.

Also, by the 5 Eliz. c. 1. to refuse the oath of supremacy will incur the pains of *præmunire*; and to defend the Pope's jurisdiction in this realm, is a *præmunire* for the first offence, and high treason for the second.

So, too, by the 13 Eliz. c. 2. to import any *agnus Dei*, crosses, beads, or other superstitious things, pretended to be allowed by the bishop of Rome, and tender the same to be used; or to receive the same with such intent, and not discover the offender; or if a justice of the peace, knowing thereof, shall not, within fourteen days, declare it to a privy councillor, they all incur a *præmunire*.

But importing or selling mass books, or other Popish books, is, by the 3 Jac. I. c. 5. only liable to a penalty of forty shillings.

Lastly, to contribute to the maintenance of a Jesuits' college, or any Popish seminary whatever, beyond sea, or any person in the same, or to contribute to the maintenance of any Jesuit or Popish

priest in England, is, by the 27 Eliz. c. 2. made liable to the penalties of *præmunire*.*

By subsequent acts of parliament, the penalties of *præmunire* have been applied to offences which have little or no relation to that from whence the name is derived. Thus,

By the 1 & 2 P. & M. c. 8. to molest the possessors of abbey lands granted by parliament to Henry VIII. and Edward VI. is a *præmunire*.

So, likewise, by the 13 Eliz. c. 10. is the offence of acting as a broker or agent in any usurious contract, when above ten per cent. interest is taken.

By 21 Jac. I. c. 3. to obtain any stay of proceedings, other than by arrest of judgment or writ of error, in any suit for a monopoly, is likewise a *præmunire*.

By the 16 Car. I. and the 1 Jac. II. c. 8. to obtain an exclusive patent for the sole making or importation of gunpowder or arms, or to hinder others from importing them, is also a *præmunire*.

On the abolition, by the 12 Car. II. c. 24. of purveyance, and the prerogative of pre-emption (or taking any victual, beasts, or goods for the king's use, at a stated price, without consent of the proprietor), the exertion of any such power for the future was declared to incur the penalties of *præmunire*.

By the 13 Car. II. c. 1. to assert, maliciously and advisedly, by speaking or writing, that both or either house of parliament have a legislative authority without the king, is declared a *præmunire*.

By the act of *habeas corpus* also, it is a *præmunire*, and incapable of the king's pardon, besides other heavy penalties, to send any subject of this realm a prisoner into parts beyond the seas.

By the 1 W. & M. st. 1. c. 8. persons of eighteen years of age refusing to take the new oaths of allegiance as well as supremacy, upon tender by the proper magistrate, are subject to the penalties of a *præmunire*; and by 7 & 8 W. III. c. 24. serjeants, counsellors, proctors, attorneys, and all officers of courts, practising without having taken the oaths of allegiance and supremacy and subscribed the declaration against Popery, are guilty of a *præmunire*, whether the oaths be tendered or not.

By the 6 Ann. c. 23. if the assembly of peers of Scotland, convened to elect their sixteen representatives in the British parliament, shall presume to treat of any other matter, save only the election, they incur the penalties of *præmunire*.

The 6 Geo. I. c. 18. (enacted in the year after the infamous South-Sea project had beggared half the nation) makes all unwarrantable undertakings by unlawful subscriptions, then commonly known by the name of *bubbles*, subject to the penalties of a *præmunire*.

The 12 Geo. III. c. 11. subjects to the penalties of the statute

* See the act 31 Geo. III. c. 32. in page 139, whereby the severe enactments against the Roman Catholics are repealed.

of *præmunire* all such as knowingly and wilfully solemnize, assist, or are present at, any forbidden marriage of such of the descendants of the body of king George II. as are by that act prohibited to contract matrimony without the consent of the crown.

The *punishment* for *præmunire* is, that, from the conviction, the defendant shall be out of the king's protection, and his lands and tenements, goods and chattels, forfeited to the king; and that his body shall remain in prison at the king's pleasure.

To obviate the savage and mistaken notion, that it was lawful to kill any one convicted of *præmunire*, the 5 Eliz. c. 1. provides, that it shall not be lawful to kill any person attainted in a *præmunire*; any law, statute, opinion, or exposition of law, to the contrary notwithstanding. But still such delinquent can bring no action for any private injury, how atrocious soever, being so far out of the protection of the law, that it will not guard his civil rights, nor remedy any grievance which he as an individual may suffer.

CHAPTER VII.

Of Misprisions and Contempts.

MISPRISONS are generally understood to be all such high offences as are under the degree of capital, but nearly bordering thereon. They are generally divided into two sorts: *negative*, which consist in the concealment of something which ought to be revealed; and *positive*, which consist in the commission of something which ought not to be done.

Of the first, or negative kind, is what is called MISPRISION OF TREASON; consisting in the bare knowledge and concealment of treason, without any degree of assent thereto; for any assent makes the party a principal traitor. But it is now enacted, by the 1 & 2 Ph. & Mar. c. 10. that a bare concealment of treason shall be only held a misprision. This concealment becomes criminal, if the party apprised of the treason do not, as soon as conveniently may be, reveal it to some judge of assize, or justice of the peace. But if there be any probable circumstances of assent, as if one go to a treasonable meeting, knowing beforehand that a conspiracy is intended against the king, or being in such company once by accident, and, having heard such treasonable conspiracy, meet the same company again, and hear more of it, but conceal it; this is an implied assent in law, and makes the concealer guilty of high treason.

The 13 Eliz. c. 2. enacts, that those who forge foreign coin, not current in this kingdom, their aiders, abettors, and procurers, shall all be guilty of misprision of treason.

MISPRISION OF FELONY is also the concealment of a felony which a man knows, but never assented to; for if he assented, this makes him either principal or accessory. And the punishment of this, in a public officer, by the statute West. 1. 3 Edw. I. c. 9. is imprisonment for a year and a day; in a common person, imprisonment for a less discretionary time; and in both, fine and ransom at the king's pleasure.

There is also another species of negative misprision; namely, the *concealment of treasure trove*, which belongs to the king or his grantees by prerogative royal: the concealment of which was formerly punishable by death, but now only by fine and imprisonment.

Misprisions which are merely positive are generally denominated CONTEMPTS, or HIGH MISDEMEANORS: of which

The first and principal is the *mal-administration of public officers*. Hitherto also may be referred the offence of *embezzling the public money*. This is not a capital crime, but subjects the committer of it to a discretionary fine and imprisonment.

Other misprisions are contempts against the *royal prerogative*: as by refusing to assist him for the good of the public; either in his councils, by advice, if called upon; or in his wars, by personal service for defence of the realm, against a rebellion or invasion. Under which class may be ranked the neglecting to join the *posse comitatús*, or power of the county. Contempts against the prerogative may also be, by preferring the interests of a foreign potentate to those of our own, or doing or receiving any thing that may create an undue influence in favour of such extrinsic power; as, by taking a pension from any foreign prince without the consent of the king. Or, by disobeying the king's lawful commands: whether by writs issuing out of his courts of justice, or by a summons to attend his privy council, or by letters from the king to a subject commanding him to return from beyond the seas (for disobedience to which his lands shall be seized till he does return, and himself afterwards punished), or by his writ of *ne creat regno*, or proclamation commanding the subject to stay at home. Disobedience to any of these commands is a high misprision and contempt; and so also is disobedience to any act of parliament, where no particular penalty is assigned; for then it is punishable, like the rest of these contempts, by fine and imprisonment at the discretion of the king's courts of justice.

Contempts and misprisions against the *king's person and government* may be by speaking or writing against them, cursing or wishing him ill, giving out scandalous stories concerning him, or doing any thing that may tend to lessen him in the esteem of his subjects, may weaken his government, or may raise jealousies between him and his people.

It has been also held an offence of this species to drink to the pious memory of a traitor; or for a clergyman to absolve persons at the gallows, who there persist in the treasons for which they die. And for this species of contempt a man may not only be

fined and imprisoned, but suffer also corporal punishment.

Contempts against the *king's title*, not amounting to treason or *præmunire*, are, the denial of his right to the crown, in common and unadvised discourse; for if it be by advisedly speaking, it amounts to a *præmunire*. This heedless species of contempt is punished with fine and imprisonment.

Likewise, if any person shall in anywise hold, affirm, or maintain, that the common laws of this realm, not altered by parliament, ought not to direct the right of the crown of England; this is a misdemeanor, by the 13 Eliz. c. 1. and punishable with forfeiture of goods and chattels.

A contempt may also arise from refusing or neglecting to take the oaths appointed by statute for the better securing the government, and yet acting in a public office, place of trust, or other capacity for which the said oaths are required to be taken, viz. those of allegiance, supremacy, and abjuration; which must be taken within six calendar months after admission. The penalties for this contempt inflicted by the 1 Geo. 1. st. 2. c. 13. are very little, if any thing, short of a *præmunire*; being incapacity to hold the said office or any other, to prosecute any suit, to be guardian or executor, to take any legacy or deed of gift, and to vote at any election for members of parliament; and, after conviction, the offender shall also forfeit 500*l.* to him that will sue for the same.

Members on the foundation of any college in the two universities, who by this statute are bound to take the oaths, must also register a certificate thereof in the college register, within one month after; otherwise, if the electors do not remove him, and elect another within twelve months, or after, the king may nominate a person to succeed him by his great seal or sign manual. Besides thus taking the oaths for offices, any two justices of the peace may, by the same statute, summon and tender the oaths to any person whom they shall suspect to be disaffected; and every person refusing the same, properly called a nonjuror, shall be adjudged a Popish rescusant convict.

Contempts against the *king's palaces* or *courts of justice* are high misprisions: and by the 33 Hen. VIII. c. 12. malicious striking in the king's palace, wherein his royal person resides, whereby blood is drawn, is punished by perpetual imprisonment, and fine at the king's pleasure; and also with loss of the offender's right hand.

But striking in the king's superior courts of justice, in Westminster Hall, or at the assizes, is made still more penal than even in the king's palace. A stroke or blow in a court of justice, whether blood be drawn or not; or even assaulting a judge sitting in the court, by drawing a weapon, without any blow struck; is punishable with the loss of the right hand, imprisonment for life, forfeiture of goods and chattels, and of the profits of his lands during life. A rescue, also, of a prisoner from any of the said courts, without striking a blow, is punished with perpetual im-

prisonment and forfeiture of goods, and of the profits of lands during life.

Not only such as are guilty of an actual violence, but of threatening or reproachful words to any judge sitting in the courts, are guilty of a high misprision, and have been punished with large fines, imprisonment, and corporal punishment. And, even in the inferior courts of the king, an affray, or contemptuous behaviour, is punishable with a fine by the judges there sitting; as by the steward in a court-leet, or the like.

Likewise, if a man assault or threaten his adversary for suing him, a counsellor or attorney for being employed against him, a juror for his verdict, or a gaoler or other ministerial officer for keeping him in custody, and properly executing his duty, he is liable to punishment by fine and imprisonment.

Lastly, to endeavour to dissuade a witness from giving evidence, to disclose an examination before the privy council, or to advise a prisoner to stand mute, (all of which are impediments of justice) are high misprisions, and contempts of the king's courts, and punishable with fine and imprisonment.

CHAPTER VIII.

Of Offences against Public Justice.

OF offences against public justice, some are felonies, whose punishments may extend to death, others are only misdemeanors.

EMBEZZLING OR VACATING RECORDS.

The embezzling or vacating records, or falsifying certain other proceedings in a court of judicature, is a felonious offence.

And by 8 Hen. VI. c. 12. if any clerk, or other person, shall wilfully take away, withdraw, or avoid any record or process in the superior courts of justice in Westminster Hall, by reason whereof the judgment shall be reversed or not take effect, it shall be felony, not only in the principal actors, but also in their procurers and abettors. And this may be tried either in the King's Bench or Common Pleas, by a jury *de medietate*, half officers of any of the superior courts, and the other half common jurors.

Likewise, by 21 Jac. I. c. 26. to acknowledge any fine, recovery, deed enrolled, statute, recognizance, bail, or judgment, in the name of another person not privy to the same, is felony without benefit of clergy. Which law extends only to proceedings in the courts themselves; but, by 4 W. & M. c. 4. to prosecute any

other person (as bail) before any judge of assize or other commissioner authorized to take bail in the county, is also felony.

ABUSES BY GAOLERS.

To prevent abuses by gaolers, it is enacted by the 14 Edw. III. c. 10. that if any gaoler, by too great duress of imprisonment, make any prisoner that he hath in ward become an *approver* or an *appellor* against his will, that is, to accuse and turn evidence against some other person; it is felony in the gaoler.

OBSTRUCTING THE EXECUTION OF LAWFUL PROCESS

Is an offence against public justice, and it hath been held that the party opposing an arrest becomes thereby *particeps criminis*, that is, an accessory in felony, and a principal in high treason.

ESCAPE.

If a man arrested upon criminal process afterwards elude the vigilance of his keepers, before he is put in hold, it is an offence against public justice, and the party is punishable by fine or imprisonment. Officers who, after arrest, *negligently* permit a felon to escape, are also punishable by fine: but *voluntary* escapes, by consent and connivance of the officer, are a much more serious offence; for it is held that such escapes amount to the same kind of offence, and are punishable in the same degree, as the offence of which the prisoner is guilty, and for which he is in custody, whether treason, felony, or trespass; and this, whether he were actually committed to gaol, or only under a bare arrest. But the officer cannot be thus punished till the felon have actually received judgment, or been attainted upon verdict, confession, or outlawry, of the crime for which he was so committed or arrested. But, before the conviction of the offender, the officer thus neglecting his duty may be fined and imprisoned for a misdemeanor.

RESCUE

Is the forcibly and knowingly freeing another from an arrest or imprisonment; and it is generally the same offence in the stranger so rescuing, as it would have been in a gaoler to have *voluntarily* permitted an escape. A rescue, therefore, of one apprehended for felony, is felony; for treason, treason; and for a misdemeanor, a misdemeanor also. But here, likewise, as upon voluntary escapes, the principal must first be attainted, or receive judgment, before the rescuer can be punished. By 11 Geo. II. c. 26. and 24 Geo. II. c. 40. if five or more persons assemble to rescue any retailer of spirituous liquors, or to assault the informers against them, it is felony, and subject to transportation for seven years. By 16 Geo. II. c. 31. to convey to any prisoner in custody for treason or felony any arms, instruments of escape or disguise, without the knowledge of the gaoler, though no escape be attempted, or any

way to assist such prisoner to attempt an escape, though no escape be actually made, is felony, and subjects the offender to transportation for seven years; or if the prisoner be in custody for petit larceny, or other inferior offence, or charged with a debt of 100*l.* it is then a misdemeanor, punishable with fine and imprisonment.

And by several special statutes, to rescue, or attempt to rescue, any person committed for the offences enumerated in those acts, is felony without benefit of clergy; and to rescue or attempt to rescue the body of a felon executed for murder, is single felony, and subject to transportation for seven years. Nay, even if any person be charged with any of the offences against the Black Act, 9 Geo. I. c. 22. and being required by order of the privy council to surrender himself, neglects so to do for forty days, both he and all that knowingly conceal, aid, abet, or succour him, are felons without benefit of clergy. But the severity of this punishment is now mitigated by the 4 Geo. IV. c. 54. which makes it transportation for seven years, or to be imprisoned only, or to be imprisoned and kept to hard labour in the common gaol or house of correction, for any time not exceeding three years.

RETURNING FROM TRANSPORTATION.

Another capital offence is the returning from transportation, or being seen at large in Great Britain, before the expiration of the term for which the felon was ordered to be transported, or had agreed to transport himself. This is felony without benefit of clergy in all cases; as is also the assisting them to escape from such as are conveying them to the port of transportation.

TAKING A REWARD FOR STOLEN GOODS.

Another offence is that of taking a reward, under pretence of helping the owner to his stolen goods. To prevent which it is enacted, by the 4 Geo. I. c. 11. that whosoever shall take a reward under the pretence of helping any one to stolen goods, shall suffer as the felon who stole them; unless he cause such principal felon to be apprehended, and brought to trial, and also give evidence against him: but now by 1 Geo. IV. c. 115. the punishment is altered to transportation for life or for any term not less than seven years, or to imprisonment with or without hard labour in the common gaol, penitentiary, or house of correction, for any term not exceeding seven years.

RECEIVING STOLEN GOODS, KNOWING THEM TO BE STOLEN.

This offence was only a misdemeanor at common law, but the 3 & 4 W. & M. c. 9. and 5 Ann. c. 31. make the offender accessory to the theft and felony. But because the accessory cannot in general be tried, unless with the principal, or after the principal is convicted, it is enacted by 1 Ann. c. 9. and 5 Ann. c. 31. that such receivers may still be prosecuted for a misdemeanor, and punished by fine and imprisonment, though the principal felon

be not before taken, so as to be prosecuted and convicted: And, in case of receiving stolen lead, iron, and certain other metals, such offence is, by 29 Geo. II. c. 30. punishable by transportation for fourteen years. By the same statute, persons having lead, iron, and other metals, in their custody, and not giving a satisfactory account how they came by the same, are guilty of a misdemeanor, and punishable by fine and imprisonment. And by the 10 Geo. III. c. 48. all knowing receivers of stolen plate or jewels, taken by robbery on the highway, or when a burglary accompanies the stealing, may be tried as well before as after the conviction of the principal, and whether he be in or out of custody; and, if convicted, shall be adjudged guilty of felony, and transported for fourteen years. And now by the 3 Geo. IV. c. 24. § 3. it is enacted, that in all cases of receiving or buying stolen goods or chattels, knowing the same to have been stolen, where it shall be deemed and construed to be felony, the offender shall and may be tried and convicted of such felony as well before as after the trial of the principal felon, and whether the said principal felon shall have been apprehended or not.

By 2 Geo. III. c. 28. if any person buy or receive any part of the cargo of any ship or vessel in the river Thames, knowing the same to be stolen, he may be tried before the principal. By 21 Geo. III. c. 69. buyers or receivers of any pewter pot or other vessel, or pewter in any shape, may be tried before the principal is convicted, and transported for seven years, or kept to hard labour for three years. And by 22 Geo. III. c. 58. where any goods or chattels, except lead, iron, copper, brass, bell-metal, and solder, are stolen, the receiver may be punished for the misdemeanor, whether the principal be amenable to justice or not, except the principal has been convicted of grand larceny, or some greater offence in stealing the same.

THEFT-BOTE,

Which is where the party robbed not only knows the felon, but also takes his goods again, or other amends, upon agreement not to prosecute. This is frequently called *compounding of felony*, and punished with fine and imprisonment.

By 25 Geo. II. c. 36. even to advertise a reward for the return of things stolen, with *No questions asked*, or words to the same purport, subjects the advertiser and the printer to a forfeiture of 50*l.* each.

COMMON BARRETRY.

Common barrety is the offence of frequently exciting and stirring up suits and quarrels between his majesty's subjects either at law or otherwise. The punishment for this offence, in a common person, is by fine and imprisonment: and by 12 Geo. I. c. 29. if any one, who hath been convicted of forgery, perjury, subornation of perjury, or common barrety, shall practise as attorney, solicitor, or agent in any suit, the court, upon complaint, shall examine it

in a summary way; and, if proved, shall direct the offender to be transported for seven years.

To this head may be referred another offence, of equal malignity, that of suing another in the name of a fictitious plaintiff, either one not in being at all, or one who is ignorant of the suit. This offence, if committed in any of the king's superior courts, is left, as a high contempt, to be punished at their discretion. But, in the courts of a lower degree, where the crime is equally pernicious, but the authority of the judges not equally extensive, it is directed by 8 Eliz. c. 2. to be punished by six months imprisonment, and treble damages to the party injured.

MAINTAINANCE.

This is an offence that bears a near relation to the former; being an officious intermeddling in a suit that no way belongs to one, by maintaining or assisting either party with money, or otherwise, to prosecute or defend it. This is an offence against public justice, as it keeps alive strife and contention, and perverts the remedial process of the law into an engine of oppression. A man may however maintain the suit of his near kinsman, servant, or poor neighbour out of charity and compassion, with impunity. Otherwise the punishment by common law is fine and imprisonment, and by the 32 Hen. VIII. a forfeiture of ten pounds.

CHAMPERTY.

This is a species of maintainance, and punished in the same manner; being a bargain with a plaintiff or defendant *champum partire*, to divide the land or other matter sued for between them, if they prevail at law, whereupon the champertor is to carry on the party's suit at his own expence.

To this must be referred the provision of the 32 Hen. VIII. c. 9. that no one shall sell or purchase any pretended right or title to land, unless the vendor have received the profits thereof for one whole year before such grant, or have been in actual possession of the land, or of the reversion or remainder, upon pain that both purchaser and vendor shall each forfeit the value of such land to the king and the prosecutor.

COMPOUNDING OF INFORMATIONS.

By 18 Eliz. c. 5. it is enacted, that if any person informing under pretence of any penal law make any composition, without leave of the court, or take any money or promise from the defendant to excuse him (which demonstrates his intent in commencing the prosecution to be merely to serve his own ends, and not for the public good), he shall be liable to fine and imprisonment, and shall be for ever disabled to sue on any popular or penal statute.

But it is no offence to compound a misdemeanor; for, in case of a misdemeanor, the person injured may maintain an action to recover a compensation in damages.

CONSPIRACIES.

A conspiracy is where two persons or more agree to indict an innocent man of felony falsely and maliciously, who is accordingly indicted and acquitted; for there the party injured may either have a civil action by writ of conspiracy, or the conspirators (for there must be at the least two to form a conspiracy) may be indicted at the suit of the king, which subjects them to fine and imprisonment.

WILFUL AND CORRUPT PERJURY.

Perjury is a crime committed by wilful false swearing in a court of justice, or by any person of authority to administer it. To constitute this crime, the perjury must be corrupt (that is, committed *malò animo*), wilful, positive, and absolute; not upon surprise, or the like; it must also be in some point material to the question in dispute.

Subornation of perjury is the offence of procuring another to take such a false oath as constitutes perjury in the principal.

The punishment of perjury and subornation is by fine and imprisonment, and never more to be capable of bearing testimony. But the 5 Eliz. c. 9. (if the offender be prosecuted thereon) inflicts the penalty of perpetual infamy, and a fine of 40*l.* on the suborner; and, in default of payment, imprisonment for six months, and to stand with both ears nailed to the pillory. Perjury itself is thereby punished with six months imprisonment, perpetual infamy, and a fine of 20*l.* or to have both ears nailed to the pillory. But the prosecution is usually carried on for the offence at common law; especially as to the penalties before inflicted, the 2 Geo. II. c. 25. superadds a power for the court to order the offender to be sent to the house of correction for a term not exceeding seven years, or to be transported for the same period, and makes it felony without benefit of clergy to return or escape within the time.

To constitute perjury, the falsehood of the oath must be wilful, and must not happen through unavoidable haste, inadvertency, or weakness. The import of the oath may be true, and yet the swearing false; for if a person swear to a truth, yet if he could not possibly know the fact, he is as much perjured as if it had been false.

BRIBERY.

Bribery is when a judge, or other person concerned in the administration of justice, takes any undue reward to influence his behaviour in his office. This offence is punished, in inferior officers, with fine and imprisonment; and in those who offer a bribe, though not taken, the same. By 11 Hen. IV. all judges and officers of the king convicted of bribery shall forfeit treble the bribe, be punished at the king's will, and be discharged from the king's service for ever.

To offer money to any of the king's ministers for the purpose of obtaining a public appointment, is held to be a misdemeanor.

EMBRACERY.

Embracery is an attempt to influence a jury corruptly to one side, by promises, persuasions, entreaties, money, entertainments, and the like. The punishment for the person embracing is by fine and imprisonment; and for the juror so embraced, if it be by taking money, the punishment is perpetual infamy, imprisonment for a year, and forfeiture of the tenfold value.

EXTORTION.

Extortion is where any officer unlawfully takes, by colour of his office, from any man any money, or thing of value, that is not due to him, or more than is due, or before it is due. The punishment for this offence is fine and imprisonment, and sometimes a forfeiture of the office.

CHAPTER IX.

Of Offences against the Public Peace.

OFFENCES against the public peace are either such as are an *actual* breach of the peace, or *constructively* so, by tending to make others break it. Both of these species are also either felonious or not felonious.

RIOTING.

By 1 Geo. I. c. 5. commonly called the Riot Act, it is enacted, that if any twelve persons are unlawfully assembled, to the disturbance of the peace, and any one justice of the peace, sheriff, or under-sheriff, or mayor of a town, shall think proper to command them by proclamation to disperse; if they contemn his orders, and continue together for one hour afterwards, such contempt shall be felony without benefit of clergy. And farther, if the reading of the proclamation be by force opposed, or the reader be in any manner wilfully hindered from the reading of it, such opposers and hinderers are felons without benefit of clergy; and all persons to whom such proclamation *ought to have been made*, and knowing of such hindrance, and not dispersing, are felons without benefit of clergy.

And, by a subsequent clause, if any person so riotously assembled begin, even before proclamation, to pull down any church, chapel, meeting-house, dwelling-house, or out-house, they shall be felons without benefit of clergy.

And, in another clause of the same act, persons injured by any building being demolished by a riotous assembly may recover

damages in an action against the hundred. And it was determined, after the riots in 1780, that the owners of houses might recover damages also for the destruction of furniture, or for any injury to their property done at the same time that the buildings were demolished, or were in part pulled down.

SEDITIONOUS MEETINGS.

By the 57 Geo. III. c. 19. it is unlawful for any person or persons to call any meeting exceeding fifty persons, or for any number of persons exceeding fifty to meet, in Westminster, or the county of Middlesex, within one mile of Westminster-Hall, (except such part of the parish of St. Paul's, Covent Garden, within that distance) for any political purpose, on any day during the sitting of parliament, or of any of the courts of law.

And by § 24. of the same act, the Spenceans, and other societies holding like doctrines with the Spenceans, are suppressed, as being unlawful confederacies against the government.

And by § 39. where any house, shop, or other building, shall be destroyed or damaged, or the goods and furniture therein, by any riotous assembly, the city, town, or hundred, are made liable for the loss or damage, to be recovered in the same manner as is provided for by the 1 Geo. I. c. 5.

By the 60 Geo. III. c. 6. no meeting of more than fifty persons (except county or other meetings excepted by the act) is to be holden, unless in separate parishes or townships, and with notice of at least six days previous to such meeting to a justice of the peace by seven resident householders.

Justices are empowered to alter the time and place of meeting, provided the time does not exceed four days. § 2.

And any adjournments of meetings are by this act declared unlawful. § 3.

No persons are allowed to attend meetings, unless freeholders of the county, or members of the corporation, or inhabitants of the city or parish, (as the case may respectively be) for which the meeting shall be held, except members of parliament or persons having the elective franchise for such places respectively, under the penalty of fine and imprisonment, the latter not to exceed twelve calendar months. § 4, 5.

Justices of the peace, sheriffs, under-sheriffs, mayors, and other head officers, are authorized to repair within their several jurisdictions to any meeting held as aforesaid. § 6.

In case any meeting shall be holden in pursuance of any such notice as aforesaid, and such notice shall express or purport that any matter or thing by law established may be altered otherwise than by the authority of the king, lords, and commons, in parliament assembled; or shall tend to incite or stir up the people to hatred or contempt of the person of his majesty, his heirs or successors, or of the government and constitution of this realm, as by law established; every such meeting shall be deemed and taken to be an unlawful assembly. § 7.

Persons attending meetings contrary to the provisions of this act, and not dispersing after proclamation made to that effect, are to be adjudged guilty of felony, and are liable to be transported for any time not exceeding seven years. § 8.

Justices, &c. are empowered to order persons propounding or maintaining propositions for altering any thing by law established, except by authority of the king, lords, and commons, to be taken into custody. And any person or persons obstructing such order, and remaining together to the number of twelve for half an hour after proclamation made to depart, are to be adjudged guilty of felony, and are liable to be transported for seven years. § 12.

By the 14th and 15th sections, other provisions are made for enforcing the act, and indemnifying justices in the execution of it.

The act is not to extend to any meeting held in a private room, nor to meetings held for returning members to parliament after the issuing and before the return of the writ. § 16, 17.

No persons except peace-officers are to attend with arms, weapons, &c. nor with flags, banners, &c. under the penalty of fine and imprisonment, the latter not to exceed two years. § 18, 19.

Justices of the peace, &c. may subdivide parishes exceeding twenty thousand inhabitants for all the purposes of this act. § 21.

Meetings may be held under this act in certain parishes in Westminster, within one mile of Westminster-Hall (except in Old or New Palace Yard during the sitting of parliament) notwithstanding the act of 57 Geo. III. c. 19. § 23.

All places for lectures or debates, unless previously licensed, are deemed by this act to be disorderly, and the persons opening such places are liable to be fined in the sum of one hundred pounds for every day or time such place is opened; and every person who shall pay, give, collect, or receive, any money or thing for admission into such place, is liable to a penalty of twenty pounds. § 26.

Magistrates may demand admission to unlicensed places, and persons obstructing them are liable to a penalty of twenty pounds. § 28.

Justices, &c. are empowered to license places for lectures, and may inspect at all times such places. § 29, 30.

Lectures at the universities, inns of court, Gresham College, &c. are excepted. § 31.

Licences are declared to be forfeited in case of seditious or immoral lectures being delivered. § 32.

By the last section it is enacted, that this act shall be and continue in force for five years from the day it passed, and until the end of the then next session of parliament.

UNLAWFUL HUNTING.

By the 9 Geo. I. c. 22. to appear *armed* in any inclosed forest, or place where deer are usually kept, or in any warren for hares or coney, or in any high road, open heath, common, or down, by day or night, with the face blacked, or otherwise *disguised*, or (being so disguised) to hunt, wound, kill, or steal any deer, to rob a warren, or to steal fish, or to procure, by gift or promise

of reward, any person to join in such unlawful act, is felony without benefit of clergy. But by the 4 Geo. IV. c. 54. the punishment is mitigated to transportation for seven years, or to be imprisoned only, or to be imprisoned and kept to hard labour in the common gaol or house of correction, for any term not exceeding three years.

SENDING THREATENING LETTERS.

Also, by the same statute 9 Geo. I. c. 22. amended by 27 Geo. II. c. 15. knowingly to send any letter without a name, or with a fictitious name, demanding money, venison, or any other valuable thing, or threatening (without any demand) to kill any of the king's subjects, or to fire their houses, out-houses, barns, or ricks, is made felony without benefit of clergy. But by the 4 Geo. IV. c. 54. it is made transportation for life, or for such term not less than seven years, as the court shall think fit: or to be imprisoned only, or to be imprisoned and kept to hard labour in the common gaol or house of correction, for any term not exceeding seven years.

DESTROYING LOCKS, SLUICES, TURNPIKE-GATES, &c.

To pull down or destroy any lock, sluice, or flood-gate, or to rescue any person in custody for the same, or maliciously to damage or destroy any banks, sluices, or other works on any navigable river, to open the flood-gates, or otherwise obstruct the navigation, or maliciously pull down, or otherwise destroy any *turnpike-gate* or fence, toll-house, or weighing-engine thereunto belonging, erected by authority of parliament, or to rescue any person in custody for the same, was felony without benefit of clergy; but now, by 1 Geo. IV. c. 115. it is transportation for life or seven years, or imprisonment for any time not exceeding seven years, according to the discretion of the court.

AFFRAYS

Are the fighting of two or more persons, in some *public* place; for if the fighting be in private, it is no affray, but an assault. The punishment of common affrays is by fine and imprisonment.

By 5 & 6 Edw. VI. c. 4. if any person shall, by words only, quarrel, chide, or brawl, in a church or church-yard, the ordinary shall suspend him, if a layman, *ab ingressu ecclesiæ*; and if a clerk in orders, from the ministration of his office during pleasure. And if any person in such church or church-yard proceed to smite or lay violent hands upon another, he shall be excommunicated *ipso facto*; or if he strike him with a weapon, or draw a weapon with intent to strike, he shall, besides excommunication, (being convicted by a jury) have one of his ears cut off; or, having no ears, be branded with the letter F in his cheek. Two persons may be guilty of an affray; but

RIOTS, ROUTS, AND UNLAWFUL ASSEMBLIES,

Must have *three* persons at least to constitute them. An *unlawful assembly* is when three or more assemble themselves together to do an unlawful act; as to pull down inclosures, to destroy a warren

or the game therein, and part without doing it, or making any motion toward it. A *rout* is where three or more meet to do an unlawful act upon a common quarrel; as forcibly breaking down fences, upon a right claimed of common, or of way, and make some advances towards it. A *riot* is where three or more actually do an unlawful act of violence, either with or without a common cause of quarrel; as, if they beat a man; or hunt and kill game in another's park, chase, warren, or liberty; or do any other unlawful act with force and violence; or even do a lawful act, as removing a nuisance, in a violent and tumultuous manner.

The punishment of unlawful assemblies, if to the number of twelve, may be capital, according to the circumstances that attend it; but, from the number of three to eleven, is by fine and imprisonment only. By the 13 Hen. IV. c. 7. any two justices, together with the sheriff or under-sheriff of the county, may come with the *posse comitatus* (if need be), and suppress any riot, assembly, or rout, arrest the rioters, and record upon the spot the nature and circumstances of the whole transaction: which record alone shall be a sufficient conviction of the offenders.

FORCIBLE ENTRY, OR DETAINER.

By the common law, a man disseised of lands or tenements might legally regain possession by force, unless his right of entry was gone by neglecting to enter in proper time; but, as this often gave occasion for serious disturbances of the public peace, it was enacted, by the 5 Ric. II. st. 1. c. 8. that all forcible entries should be punished with imprisonment and ransom at the king's will. And, by the several statutes of 15 Ric. II. c. 2; 8 Hen. VI. c. 9; 31 Eliz. c. 11; and 21 Jac. I. c. 15. upon any forcible entry, or forcible detainer after peaceable entry, into any lands or benefices of the church, one or more justices of the peace, taking sufficient power of the county, may go to the place, and there record the force upon his own view, as in case of riots; and, upon such conviction, may commit the offender to gaol, till he make fine and ransom to the king. And, moreover, the justice or justices have power to summon a jury, to try the forcible entry or detainer complained of; and if the same be found by that jury, then, besides the fine on the offender, the justice shall make restitution by the sheriff of the possession, without inquiring into the merits of the title; for the force is the only thing to be tried, punished, and remedied by them; and the same may be done by indictment at the general sessions.

But this provision does not extend to such as endeavour to maintain possession by force, where they themselves, or their ancestors, have been in the peaceable enjoyment of the lands and tenements for three years immediately preceding.

RIDING OR GOING ARMED.

This is particularly prohibited by the statute of Northampton, 2 Edw. III. c. 3. upon pain of forfeiture of the arms, and imprisonment during the king's pleasure.

FALSE AND PRETENDED PROPHECIES.

The 5 Eliz. c. 15. punishes with a penalty, for the first offence, of ten pounds and one year's imprisonment; and for the second, forfeiture of all goods and chattels, and imprisonment during life.

CHALLENGES TO FIGHT,

Either by word or letter, or to be the bearer of such challenge, are punishable by fine and imprisonment, according to the circumstances of the offence. If a challenge arise on account of any money won at gaming, or if any assault or affray happen upon such account, the offender, by 9 Ann. c. 14. shall forfeit all his goods to the crown, and suffer two years imprisonment.

CHAPTER X.

Of Offences against Public Trade.

OFFENCES against public trade are the following:—

OWLING,

So called from its being usually carried on in the night, is the offence of transporting wool or sheep out of the kingdom.

But, by the 28 Geo. III. c. 38. all the former statutes respecting the exportation of sheep and wool are repealed, and an infinite variety of regulations and restrictions upon this subject are consolidated in that statute, which it behoves the dealers and carriers of wool to pay particular attention to.

The principal prohibitions are, that if any person shall send or receive any sheep on board any ship or vessel, to be carried out of the kingdom, the sheep and vessel are both forfeited, and the person so offending shall forfeit 3*l.* for every sheep, and shall suffer solitary imprisonment for three months.

But whether sheep, by a licence from the collector of the customs, may be taken on board for the use of the ship's company.

And every person who shall export out of the kingdom any wool or woollen article slightly made up, so as easily to be reduced to wool again, or any fullers' earth, or tobacco-pipe clay; and every carrier, ship-owner, commander, mariner, or other person, who shall knowingly assist in exporting, or in attempting to export these articles, shall forfeit 3*s.* for every pound weight, or the sum of 50*l.* in the whole, at the election of the prosecutor, and shall also suffer solitary imprisonment for three months.

But wool may be carried coastwise, upon being duly entered, and

security being given, according to the directions of the statute, to the officer of the port from whence the same shall be conveyed.

And the owners of sheep which are shorn within five miles of the sea, or within ten miles in Kent and Sussex, cannot remove the wool without giving notice to the officer of the nearest port, as directed by the statute.

SMUGGLING.

This offence is restrained by a great variety of statutes, which inflict pecuniary penalties, and seizures of goods for smuggling, and affix the guilt of felony, with transportation for seven years, upon more open practices. By the 19 Geo. II. c. 34. if three or more persons shall assemble with fire-arms or other offensive weapons to assist in the illegal exportation or importation of goods, or in rescuing the same after seizure, or in rescuing offenders in custody for such offences, or shall pass with such goods in disguise, or shall wound, shoot at, or assault any officers of the revenue when in the execution of their duty, such persons shall be felons without benefit of clergy.

FRAUDULENT BANKRUPTCY.

Under this head we may class the bankrupt's neglect of surrendering himself to his creditors, his non-conformity to the direction of the several statutes, his concealing or embezzling his effects to the value of 20*l.* and his withholding any books or writings with intent to defraud his creditors; all which is made felony; and by the 1 Geo. IV. c. 115. the offenders are liable to be transported for life or for any term not less than seven years; or, if the court think fit, the offender may be imprisoned only, or imprisoned or kept to hard labour, in any gaol or house of correction or penitentiary, for the space of seven years. And even without any actual fraud, if the bankrupt cannot make it appear that he is disabled from paying his debts by some casual loss, by 21 Jac. I. c. 19. he shall be set in the pillory for two hours, with one of his ears nailed to the same, and cut off.*

The subject of bankruptcy is fully treated of in a subsequent part of the work.

USURY.

By the 12 Ann. c. 16. no person shall, directly or indirectly, for loan of any money, or any thing, take above the value of 5*l.* for the forbearance of 100*l.* for a year, and so proportionably for a greater or less sum; and all bonds, contracts, and assurances, made for payment of any principal sum to be lent on usury above the rate of 5*l.* per cent. shall be utterly void: and whoever shall take, accept, or receive, by way of corrupt bargain, loan, &c. a greater interest, shall forfeit treble the money borrowed, one half of the penalty to the prosecutor, the other to the king. And if any

* See p. 177, *Note.*

scrivener or broker take more than five shillings per cent. procuration money, or more than twelve-pence for making a bond, he shall forfeit 20*l.* with costs, and suffer imprisonment for half a year.

These restrictions, however, do not apply to contracts made in foreign countries; for on such contracts the court will direct the payment of interest according to the law of the country in which such contract was made. Thus, Irish, American, Turkish, and Indian interest, have been allowed in our courts to the amount of even twelve per cent. : for the moderation or exorbitance of interest depends upon local circumstances, and the refusal to enforce such contracts would put a stop to all foreign trade.

It is not necessary that money should be actually advanced, to constitute the offence of usury; but any contrivance or pretence whatever to gain more than legal interest, where it is the intent of the parties to contract for a loan, will be usury; as, where a person applies to a tradesman to lend him money, who, instead of cash, furnishes him with goods, to be paid for at a future day, but at such an exorbitant price as to secure to himself more than legal interest upon the amount of their intrinsic value; this is an usurious contract. The question of usury, or whether a contract is a colour and pretence for an usurious loan, or is a fair and honest transaction, must, under all its circumstances, be determined by a jury, subject to the correction of the court by a new trial.

It is remarkable, that one species of indirect usury is guarded against by the 37 Hen. VIII. c. 9. and this part of the statute seems to be still in force. By this statute it is enacted, that no person shall sell his merchandize to any other, and within three months after buy the same, or any part thereof, for a less price, knowing them to be the same; on pain of forfeiting double the value (half to the informer, and half to the king), and also to be punished by fine and imprisonment.

It is now clearly settled, that bankers and other persons discounting bills may not only take five per cent. for interest, but also a reasonable sum besides for their trouble and risk in remitting cash, and for other incidental expences. But if a banker deduct the discount of 5*l.* per cent. upon a bill, and, instead of paying the remainder in cash, give a draft for it, even at a short date, this has been held to be usury; for he not only gains five per cent. but also the further benefit of the money till that draft is paid. But whether more than 5*l.* per cent. be intentionally taken for the loan and forbearance of money is a question of fact to be decided by a jury. It ought not to be considered usury, if it is done at the request and for the convenience of the party, who might have had cash instead of such bill, and where it is not a device and contrivance to get beyond the fair allowance of interest and expence of commission.

If a person discount a bill for the drawer, upon the terms that he shall receive 5*l.* per cent. discount, and an additional sum for guaranteeing the payment of the bill by the acceptor, he having no doubt of the acceptor's solvency, this is an usurious contract.

On a contract for a loan, reserving 5*l.* per cent. interest, if a premium be taken at the time of the loan, the crime of usury is complete as soon as any interest is paid.

If a contract be entered into to pay more than legal interest, though all securities are immediately void, yet the penalty is not incurred till more than legal interest is actually paid.

For, to subject the party to the penalty under the statute 12 Ann. st. 2. c. 16. there must be both an usurious contract at the time of the loan, and an usurious taking in pursuance of it, of money or money's worth.

But, in order to avoid a security, it must be shewn that the agreement was in its origin illegal and usurious; it will not be usury, though more than legal interest is afterwards paid, if not originally agreed for.

An agreement to replace stock; and pay the amount of the dividends, though more than 5*l.* per cent. is not usurious.

Where the principal is secured at all events, except from the insolvency of the borrower, and more than 5*l.* per cent. may be gained by the terms of the contract, as by the profits of some concern, the contract is usurious.

But it is an established rule, that no contract is within the statute of usury, although more than 5*l.* per cent. is to be paid upon the money advanced, if the principal be actually put in hazard, and may be totally lost to the lender.

And if the original contract be not usurious, nothing done afterwards can make it so; a counter-bond to save one harmless against a bond made upon a corrupt agreement, will not be void by the statutes. But if the original agreement be corrupt between all the parties, and so within the statute, no colour will exempt it from the danger of the statutes against usury.

A contract for 6*l.* per cent. made before the statute, is not within the meaning of it; and therefore it is still lawful to receive such interest in respect of any such contract. The receipt of higher interest than is allowed by the statute, by virtue of an agreement subsequent to the first contract, does not avoid an assurance fairly made. Neither is a bond to secure a just debt payable with lawful interest avoided by a subsequent usurious contract; but the obligee is thereby subject to the penalty by the latter clause of the statute.

If a contract be entered into to pay more than legal interest, though all securities are immediately void, yet the penalty is not incurred till more than legal interest is actually paid. But, in order to avoid a security, it must be shewn that the agreement was in its origin illegal and usurious; it will not be usury, though more than legal interest is afterwards paid, if not originally agreed for.

If a person discount a bill, and take more than legal interest, he cannot be prosecuted for the penalty till that bill is paid in money or money's worth, or receives so much of it as with the discount will amount to more than legal interest for the money he

advanced. If, when the bill is due, he receive only another bill in payment, the penalty cannot be incurred till the second bill is discharged.

Discounting bills in the way of trade is not usury, though it produce more than $5\frac{1}{2}$ per cent.: but if interest be taken at the beginning of the year or time for which the loan is made, it is usury. As, where 780*l.* interest was deducted upon a loan of 5000*l.* for three years, it was held to be usury.

By the 58 Geo. III. c. 93. a bill of exchange or promissory note, founded upon an usurious contract, shall not vitiate the same in the hands of a *bond fide* holder, who has had no knowledge of the usurious transaction.

It was held by the court of King's Bench, in Michaelmas term 1820, that a bill of exchange, founded on a gambling transaction, is good in the hands of a *bond fide* holder.

CHEATING.

By 33 Hen. VIII. c. 8. if any person shall falsely and deceitfully obtain any money or goods, by colour and means of any *false priory tokens*, or counterfeit letter made in another man's name, &c. for obtaining money or goods from such person, he shall suffer punishment by imprisonment, setting upon the pillory,* or any corporal pains, short of death, that the court in its discretion may think proper.

And, by 30 Geo. II. c. 24. all persons who knowingly and designedly, by *false pretences*, or by sending threatening letters in order to extort money or goods, shall obtain from any person money, goods, wares, or merchandises, with intent to cheat or defraud any person of the same, shall be put in the pillory, or publicly whipped, or fined and imprisoned, or transported.

MONOPOLY.

By 21 Jac. I. c. 3. all monopolies, and all commissions, grants, licences, letters patent, &c. to any person or body politic, &c. for any sole buying, selling, making, working, using of any thing, &c. shall be void.

But, by a proviso in the same statute, letters patent, &c. heretofore made for twenty-one years, or hereafter to be made for fourteen years, for the sole working or making of any new inventions or manufactures, are excepted.

Grants to a city or corporation, or to any company, &c. for the maintenance or ordering of trade; and letters patent concerning printing, saltpetre, gunpowder, great ordnance, and shot, are also excepted.

* By the 56 Geo. III. c. 138. the punishment of the pillory is abolished, except for the following offences; viz. for the taking any false oath, or for committing any manner of wilful and corrupt perjury, or for the procuring or suborning any other person so to do; or for wilfully, falsely, and corruptly affirming or declaring, or procuring or suborning any other person so to affirm and declare, in any manner or thing, which if the same had been deposed in the usual form would have amounted to wilful and corrupt perjury. And in all cases where the punishment of the pillory has hitherto formed the whole or a part of the judgment, it shall be lawful for the court to pass sentence of fine or imprisonment, or of both, in lieu of pillory.

FORESTALLING, ENGROSSING, AND REGRATING.

The offence of *forestalling* the market, is an offence against public trade. This was described by the 5 & 6 Edw. VI. c. 16. to be by buying or contracting for any cattle, merchandize, or victual, coming on the way to the market, or dissuading persons from buying their goods or provisions there; or persuading them to enhance the price when there; any of which practices makes the market dearer to the fair trader. And in *Rex v. Waddington* it was decided, that spreading rumours with intent to enhance the price of any article amounts to the same offence.

Regrating is described by the same statute to be, the buying of corn or other dead victual in any market, and selling it again in the same market, or within four miles of the place. For this also enhances the price of the provisions, as every successive seller must have a successive profit.

Engrossing is also described to be the getting into one's possession or buying up large quantities of corn or other dead victuals, with intent to sell them again. And so the total engrossing of any other commodity, with intent to sell it at an unreasonable price, is an offence indictable and finable at the common law.

Several statutes have been made from time to time against these offences in general; especially with respect to particular species of goods, according to their several circumstances; almost all of which from 5 & 6 Edw. VI. are repealed by the 12 Geo. III. c. 71. But these offences still continue punishable upon indictment at the common law by fine and imprisonment.

Combinations among victuallers or artificers, to raise the price of provisions, or any commodities, or the rate of labour, are in many cases severely punished by particular statutes; in particular by the 40 Geo. III. in which many wholesome but severe clauses are introduced; and in general by 2 & 3 Edw. VI. c. 16. with the forfeiture of 10*l.* or twenty days imprisonment, with an allowance of only bread and water, for the first offence; 20*l.* or the pillory,* for the second; and 40*l.* for the third, or else the pillory, loss of one ear, and perpetual infamy.

SEDUCTION OF ARTIFICERS AND MANUFACTURERS.

To prevent the destruction of our home manufactures by *transporting and seducing our artists* to settle abroad, it is provided by 5 Geo. I. c. 27. that such as so entice or seduce them shall be fined 100*l.* and imprisoned three months; and for the second offence, shall be fined at discretion, and imprisoned a year; and the artificers so going into foreign countries, and not returning within six months after warning given them by the British ambassador where they reside, shall be deemed aliens, forfeit all their lands and goods, and shall be incapable of any legacy or gift.

By 23 Geo. II. c. 13. the seducers incur, for the first offence, a forfeiture of 500*l.* for each artificer contracted with to be sent abroad, and imprisonment for twelve months; and for the second, 1000*l.* and are liable to two years imprisonment; and by the same

* See p. 177, Note.

statute, connected with 14 Geo. III. c. 71. if any person export any tools or utensils used in the silk, linen, cotton, or woollen manufactures (excepting wool-cards to North America), he forfeits the same, and 200*l.*; and the captain of the ship, having knowledge thereof, 100*l.*

And if any captain of a king's ship, or officer of the customs, knowingly suffer such exportation, he forfeits 100*l.* and his employment, and is for ever made incapable of bearing any public office; and every person collecting such tools or utensils, in order to export the same, shall, on conviction at the assizes, forfeit such tools, and also 200*l.*

By 21 Geo. III. c. 3. if any person shall put on board any ship not bound to any place in Great Britain or Ireland, or shall have in his custody with intent to export, any such article, he shall forfeit the same, and also the sum of 200*l.* and be imprisoned a year; and till the forfeiture is paid; and every captain and custom-house officer knowingly receiving the same, or taking an entry of it, shall forfeit 200*l.*

By 22 Geo. III. c. 60. if any person shall entice or encourage any artificer employed in printing calicoes, cottons, muslins, or linens, to leave the kingdom, he shall forfeit 500*l.* and be imprisoned one year; and persons who export, or attempt to export, any engines or implements used in that manufacture, shall forfeit 500*l.* Captains of ships and custom-house officers conniving at these offences forfeit 100*l.* and are incapable of holding any office under the crown.

By 25 Geo. III. c. 67. any person who entices or encourages an artificer in the iron and steel manufactures to leave the kingdom, shall forfeit 500*l.* and be imprisoned for one year.

And persons who attempt to export any instrument specified by name in the 26 Geo. III. c. 82. shall forfeit 200*l.* and be imprisoned one year: and captains and custom-house officers conniving at the offence are subject to the same penalty, and become incapable of exercising any public employment.

CHAPTER XI.

Of Offences against the Health and Morals of the Community.

By 1 Jac. I. c. 31. if any person be affected with the plague, or dwell in any infected house, he may be commanded by the mayor or constable, or other head officer, to keep his house; and if such person so commanded go abroad, and converse in company, if he have no plague-sore upon him, he shall be punished as a vagabond by whipping, and be bound to his good behaviour; but if he have any infectious sore upon him uncured, he then shall be guilty of felony.

By 39 & 40 Geo. III. c. 80. all former acts of performance of quarantine by ships coming from infected countries are repealed,

and the regulations, which are very numerous, are incorporated into that act: amongst these it is provided, that if a ship come from any place visited with the plague or other infectious disease, or shall have any person on board actually infected, if the commander shall conceal the same, he shall be guilty of felony without benefit of clergy; and if, whilst the ship is performing quarantine, he quit the ship himself, or permit any other person to quit it, he forfeits 500*l.*: and every other person quitting it shall suffer six months imprisonment, and forfeit 200*l.*

SELLING UNWHOLESOME PROVISIONS.

To prevent which, the 31 Hen. III. st. 6. and the ordinance for bakers, c. 7. prohibit the sale of corrupted wine, contagious or unwholesome flesh, or flesh that is bought of a Jew, under pain of amercement for the first offence, pillory for the second, fine and imprisonment for the third, and abjuration of the town for the fourth.

And by the 12 Car. II. c. 25. any brewing or adulteration of wine is punished with the forfeiture of 100*l.* if done by the wholesale merchant, and 40*l.* if done by the vintner or retail dealer.

CLANDESTINE MARRIAGES.

By the 4 Geo. IV. c. 76. it is enacted, that from the first of November, 1823, so much of the 26 Geo. II. c. 33. as was in force immediately before the passing of this act; and also, an act passed in the present session of parliament, shall be repealed; save and except so far as the said acts repeal any former act, or any clause, matter, or thing therein contained. § 1.

And all banns of matrimony shall be published in the parish church, or in some public chapel of or belonging to such parish or chapelry wherein the persons to be married shall dwell, upon three Sundays preceding the solemnization of marriage, during the time of morning service, or of evening service (if there shall be no morning service), immediately after the second lesson; and if the persons to be married shall dwell in divers parishes or chapelries, the banns shall be published in the church or in any such chapel as aforesaid belonging to such parish or chapelry wherein each of the said persons shall dwell: and the marriage shall be solemnized in one of such parish churches or chapels. § 2.

The bishop of the diocese, with the consent of the patron and the incumbent of the church of the parish in which any public chapel having a chapelry thereunto annexed may be situated, or of any chapel situated in an extra-parochial place, may authorize the publication of banns and solemnization of marriages in such chapel for persons residing within such chapelry or extra-parochial place respectively. § 3.

In every such chapel there shall be placed, in some conspicuous place, a notice in the words following: "Banns may be published, and marriages solemnized, in this chapel." § 4.

By section 6, the churchwardens and chapelwardens of churches and chapels, shall provide a proper book, marked and ruled respectively in the manner directed for the register book of

marriages; and the banns shall be published from the said register book, and shall be signed by the officiating minister, or by some person under his direction.

Notice of the names and place and time of abode of parties to be given to the minister seven days before the publication of banns. § 7.

Ministers are not punishable for marrying minors without the consent of parents, &c. after the publication of banns, unless they have notice of dissent; if dissent is publicly declared, the publication of banns is void. § 8.

Republishing of banns is necessary, if marriage is not solemnized within three months after the first publication. § 9.

And no licence of marriage shall be granted to solemnize any marriage in any other church or chapel than in the parish church or in some public chapel of or belonging to the parish or chapelry within which the usual place of abode of one of the persons to be married shall have been for the space of fifteen days immediately before the granting of such licence. § 10.

And if any caveat be entered against the grant of any licence for a marriage, no licence shall issue till the said caveat, or a true copy thereof, be transmitted to the judge out of whose office the licence is to issue, and until the judge has certified to the registrar, that he has examined into the matter of the caveat, and is satisfied that it ought not to obstruct the grant of the licence, or until the caveat be withdrawn by the party who entered it. § 11.

And for avoiding all fraud and collusion in obtaining of licences, before any licence be granted, one of the parties shall personally swear before the surrogate, &c. that he or she believeth that there is no impediment of kindred or alliance, or of any other lawful cause, nor any suit commenced in any ecclesiastical court, to bar or hinder the proceeding of the said matrimony; and that one of the said parties hath, for the space of fifteen days immediately preceding, had his or her usual place of abode within the parish or chapelry within which such marriage is to be solemnized; and where either of the parties, not being a widower or widow, shall be under the age of twenty-one years, that the consent of the person or persons whose consent to such marriage is required under the provisions of this act has been obtained thereto: provided always, that if there shall be no such person or persons having authority to give such consent, it shall be lawful to grant such licence. § 14.

Bond not required before granting any licence. § 15.

The father, if living, of any party under twenty-one years of age, such parties not being a widower or widow; or if the father shall be dead, the guardian or guardians of the person of the party so under age, lawfully appointed, or one of them; and in case there shall be no such guardian or guardians, then the mother of such party, if unmarried; and if there shall be no mother unmarried, then the guardian or guardians of the person appointed by the court of chancery, if any, or one of them, shall have authority to give consent to the marriage of such party. § 16.

And in case the father or fathers of the parties to be married, or of one of them, so under age, shall be *non compos mentis*, or the guardian or guardians, mother or mothers, or any of them whose consent is made necessary, shall be *non compos mentis*, or in parts beyond the seas, or shall unreasonably or from undue motives refuse or withhold his, her, or their consent to a proper marriage, then persons desirous of marrying may apply by petition to the lord chancellor, master of the rolls, or vice-chancellor of England; and in case the marriage proposed shall appear to be proper, the said lord chancellor, master of the rolls, or vice-chancellor, shall judicially declare the same to be so. § 18.

If marriages by licence be not solemnized within three months, a new licence must be obtained. § 19.

And if any person shall solemnize matrimony, in any other place than a church, or such public chapel wherein banns may be lawfully published, or at any other time than between the hours of eight and twelve in the forenoon, unless by special licence, or shall solemnize matrimony without due publication of banns, unless licence of marriage be first had and obtained; or if any person, falsely pretending to be in holy orders shall solemnize matrimony; every person knowingly and wilfully so offending, shall be guilty of felony, and shall be transported for fourteen years: provided, that all prosecutions shall be commenced within three years. § 21.

And if any person shall knowingly and wilfully intermarry in any other place than a church, or such public chapel wherein banns may be lawfully published, unless by special licence, or shall knowingly and wilfully intermarry without due publication of banns or licence, or shall knowingly and wilfully consent to or acquiesce in the solemnization of such marriage by any person not being in holy orders, the marriage of such persons shall be null and void. § 22.

And if any valid marriage solemnized by licence shall be procured by a party to such marriage to be solemnized between persons, one or both of whom shall be under the age of twenty-one, not being a widower or widow, contrary to the provisions of this act, by means of such party falsely swearing as to any matter or matters to which such party is hereinbefore required personally to swear, such party wilfully and knowingly so swearing: or if any valid marriage by banns shall be procured by a party thereto to be solemnized by banns between persons, one or both of whom shall be under the age of twenty-one years, not being a widower or widow, such party knowing that such person as aforesaid under the age of twenty one years had a parent or guardian then living, and that such marriage was had without the consent of such parent or guardian, and knowing that banns had not been duly published, and having knowingly caused or procured the undue publication of banns; then and in every such case it shall be lawful for his majesty's attorney general, by information in the nature of an English bill, in the court of chancery or court of exchequer, at the relation of a parent or guardian of the minor, whose consent has not been given, and who shall be responsible for any costs incurred

in such suit, to sue for a forfeiture of all estate, right, title, and interest in any property which hath accrued or shall accrue to the party so offending by force of such marriage; and such court shall have power to order and direct that all such estate, right, title, and interest in the property, shall be secured for the benefit of the innocent party, or of the issue of the marriage, or of any of them; and if both the parties so contracting marriage shall be guilty of any such offence aforesaid, it shall be lawful for the said court to settle and secure such property, or any part thereof, immediately for the benefit of the issue of the marriage, subject to such provisions for the offending parties, by way of maintenance or otherwise, as the said court shall think reasonable, regard being had to the benefit of the issue of the marriage during the lives of their parents, and of the issue of the parties respectively by any future marriage, or of the parties themselves, in case either of them shall survive the other: but no remedy at law, as provided by this section of the act, can be had, unless such relator or relators had not known or discovered that such marriage had been solemnized more than three months previous to his or their application to the attorney or solicitor general. § 23.

All agreements, settlements, and deeds, in consequence of or in relation to which marriage such information as aforesaid shall be filed, or by either of the said parties, before and in contemplation of such marriage, or after such marriage, for the benefit of the parties or either of them, or their issue, so far as the same shall be contrary to or inconsistent with the provisions of such security and settlement as shall be made by or under the direction of such court as aforesaid, under the authority of this act, shall be absolutely void, and have no force or effect. § 24.

Any original information to be filed for the purpose of obtaining a declaration of any forfeiture, shall be filed within one year after the marriage; and in case any person or necessary party to any such information shall abscond, or be or continue out of England, the court may order such person to appear within such time as shall seem fit; and to cause such order to be served at any place out of England, or to cause such order to be inserted in the London Gazette, and other British or foreign newspapers: and in default of such person appearing, to order such information to be taken as confessed by such person, and to proceed to make such decree or order upon such information as such court might have made if such person had appeared to and answered such information: provided always, that in case the person at whose relation any such suit shall have been instituted shall die pending such suit, it shall be lawful for the court of chancery to appoint a proper person or persons at whose relation such suit may be continued. § 25.

After any marriage by banns, it shall not be necessary in support of it to give any proof of the actual dwelling of the parties in the parishes or chapelries wherein the banns were published; or where the marriage is by licence, it shall not be necessary to give any proof that the usual place of abode of one of the parties

for the space of fifteen days was in the parish or chapelry where the marriage was solemnized; nor shall any evidence in either of the said cases be received to prove the contrary, in any suit touching the validity of such marriage. § 26.

And in no case whatsoever shall any suit or proceedings be had in any ecclesiastical court, in order to compel a celebration of any marriage *in facie ecclesiæ*, by reason of any contract of matrimony, whether *per verba de presenti*, or *per verba de futuro*. § 27.

All marriages shall be solemnized before two or more credible witnesses, besides the minister; and immediately after an entry shall be made in the register book; in which it shall be expressed that the marriage was by banns or licence, and if both or either of the parties married by licence be under age, not being a widower or widow, with consent of the parents or guardians, as the case shall be; such entry to be signed by the minister, by the parties married, and attested by such two witnesses. § 28.

Persons convicted of making a false entry, or of forging, &c. any such entry, or of forging, &c. any licence, or of destroying such register, to be transported for life. § 29.

Nothing in this act shall extend to any marriages amongst the Quakers, or amongst the Jews, where both the parties to any such marriage shall be Quakers or Jews. § 30, 31.

This act to extend only to England. § 33.

BIGAMY.

By 1 Jac. I. c. 81. if any person, being married, do afterwards marry again, the former husband or wife being alive, it is felony, but within the benefit of clergy. The first wife, in this case, shall not be admitted as a witness against her husband, because she is the true wife; but the second may, for she is no wife at all; and so *vice versâ*, of a second husband.

This act makes an exception to five cases, in which such second marriage is not felony; though in the three first it is void, and the parties are subject to the censures and punishment of the ecclesiastical courts. 1. Where either party hath been continually abroad for seven years, whether the party in England hath had notice of the other's being living or not. 2. Where either of the parties hath been absent from the other seven years *within* this kingdom, and the remaining party hath had no knowledge of the other's being alive within that time. 3. Where there is a divorce (or separation *a mensâ et thoro*) by sentence in the ecclesiastical courts. 4. Where the first marriage is declared absolutely void by any such sentence, and the parties loosed *a vinculo*. Or, 5. Where either of the parties was under the age of consent at the time of the first marriage; for, in such case, the first marriage was voidable by the disagreement of either party, which the second marriage very clearly amounts to.*

By the 35 Geo. III. c. 67. persons convicted of bigamy are rendered subject to the same punishment as those who are convicted of grand or petit larceny.

* See the new Marriage Act, 4 Geo. IV. c. 76. page 180.

VAGRANCY.

By the 5 Geo. IV. c. 83. all provisions heretofore made relative to idle and disorderly persons, rogues, and vagabonds, incorrigible rogues, or other vagrants in England, are repealed, and it is enacted as follows.

Idle and disorderly persons.—Every person being able wholly or in part to maintain himself or herself, or family, by work or other means, and wilfully refusing or neglecting so to do, by which he or she or any of his or her family shall have become chargeable to any parish, township, or place; every person returning to and becoming chargeable in any parish, township, or place from whence he or she shall have been legally removed, unless he or she shall produce a certificate of the churchwardens and overseers of the poor of some other parish, township, or place, thereby acknowledging him or her to be settled there; every petty chapman or pedlar wandering abroad and trading, without being duly licensed, or otherwise authorized by law; every common prostitute wandering in the public streets or public highways, or in any place of public resort, and behaving in a riotous or indecent manner; and every person wandering abroad, or placing himself or herself in any public place, street, highway, court, or passage, to beg or gather alms, or causing or procuring or encouraging any child or children so to do, shall be deemed an *idle and disorderly person*; and any justice of the peace may commit such offender to the house of correction, there to be kept to hard labour for any time not exceeding one calendar month. § 3.

Rogues and Vagabonds.—Every person committing any of the offences hereinbefore mentioned, after having been convicted as an idle and disorderly person; every person pretending or professing to tell fortunes, or using any subtle craft, means, or device, by palmistry or otherwise, to deceive and impose on any of his majesty's subjects; every person wandering abroad and lodging in any barn or outhouse, or in any deserted or unoccupied building, or in the open air, or under a tent, or in any cart or waggon, not having any visible means of subsistence, and not giving a good account of himself or herself; every person wilfully exposing to view, in any street, road, highway, or public place, any obscene print, picture, or other indecent exhibition; every person wilfully, openly, lewdly, and obscenely exposing his person in any street, road, or public highway, or in the view thereof, or in any place of public resort, with intent to insult any female; every person wandering abroad and endeavouring by the exposure of wounds or deformities to obtain or gather alms; every person going about as a gatherer or collector of alms, or endeavouring to procure charitable contributions of any nature or kind, under any false or fraudulent pretence; every person running away and leaving his wife or children chargeable to any parish, township, or place; every person playing or betting in any street, road, highway, or other open and public place, at or with any table or instrument of gaming at;

any game or pretended game of chance; every person having in his or her custody or possession any picklock key, crow, jack, bit, or other implement, with intent feloniously to break into any dwelling-house, warehouse, coach-house, stable, or outbuilding, or being armed with any gun, pistol, hanger, cutlass, bludgeon, or other offensive weapon, or having upon him or her any instrument, with intent to commit any felonious act; every person being found in or upon any dwelling-house, warehouse, coach-house, stable, or outhouse, or in any inclosed yard, garden, or area, for any unlawful purpose; every suspected person or reputed thief, frequenting any river, canal, or navigable stream, dock, or basin, or any quay, wharf, or warehouse near or adjoining thereto, or any street, highway, or avenue leading thereto, or any place of public resort, or any avenue leading thereto, or any street, highway, or place adjacent, with intent to commit felony; and every person apprehended as an idle and disorderly person, and violently resisting any constable or other peace officer so apprehending, and being subsequently convicted of the offence for which he or she shall have been so apprehended, shall be deemed a *rogue and vagabond*; and any justice of the peace may commit such offender to the house of correction, there to be kept to hard labour for any time not exceeding three calendar months; and every such picklock key, crow, jack, bit, and other implement, and every such gun, pistol, hanger, cutlass, bludgeon, or other offensive weapon, and every such instrument as aforesaid, shall become forfeited. § 4.

Incorrigible rogues.—Every person breaking or escaping out of any place of legal confinement before the expiration of the term for which he or she shall have been committed by virtue of this act; every person committing any offence against this act which shall subject him or her to be dealt with as a rogue and vagabond, such person having been at some former time adjudged so to be and duly convicted thereof; and every person apprehended as a rogue and vagabond, and violently resisting any constable or other peace officer so apprehending him or her, and being subsequently convicted of the offence for which he or she shall have been so apprehended, shall be deemed an *incorrigible rogue*; and any justice of the peace may commit such offender to the house of correction, there to remain until the next general or quarter sessions of the peace; and every such offender shall be there kept to hard labour during the period of his or her imprisonment. § 5.

Any person may apprehend vagrants; and all constables and other persons refusing to assist are liable to fine and punishment. § 6.

Any justice of the peace, upon oath made before him that any person hath committed or is suspected to have committed any offence against this act, may issue his warrant to apprehend and bring before him the person so charged. § 7.

Any constable, peace officer, or other person, apprehending any person charged with being an idle and disorderly person, or a rogue and vagabond, or an incorrigible rogue, may take any horse,

mule, ass, cart, car, caravan, or other vehicle, or goods in the possession or use of such person, and may take the same as well as such person before some justice of the peace; who may order the offender to be searched, and his trunks, boxes, bundles, parcels, or packages to be inspected, and may order any money which may be found to be applied towards the expence of apprehending and maintaining such offender during the time for which he shall be committed; and if money sufficient be not found, may order a part or the whole of such other effects then found to be sold, and the produce applied as aforesaid; and the overplus, after deducting the charges of such sale, shall be returned to the offender. § 8.

When any justice shall commit any *incorrigible rogue* to the house of correction till the next general or quarter sessions, or when any *idle and disorderly person, rogue and vagabond, or incorrigible rogue*, shall give notice of his intention to appeal, such justice shall require the person by whom such offender shall be apprehended, and the persons whose evidence shall appear material to prove the offence, to become bound in recognizances to appear at the said sessions; and the justices of the peace may order the treasurer of the county, &c. to pay such sums of money as to the court shall seem reasonable, to reimburse their expences and loss of time; and if any such person shall refuse to enter into such recognizance, the justice or justices may commit them to the common gaol. § 9.

When any *incorrigible rogue* shall have been committed until the next general or quarter sessions, the justices of the peace there assembled may examine into the circumstances of the case, and order that such offender be further imprisoned and kept to hard labour for not exceeding one year from the time of such order, and, if they think fit, that such offender (not being a female) be punished by whipping. § 10.

Any constable or other peace officer neglecting his duty, or any person disturbing or hindering any constable or other peace officer in the execution of this act, shall forfeit not exceeding 5*l*. § 11.

Any justice of the peace, upon information on oath, that any person hereinbefore described to be an *idle and disorderly person, or a rogue and vagabond, or an incorrigible rogue*, is suspected to be concealed in any house kept for the reception, lodging, or entertainment of travellers, may authorize any constable or other person to enter at any time into such house, and apprehend every such offender as shall be found therein. § 13.

Any person aggrieved by any determination of any justice out of sessions, may appeal to the next general or quarter sessions, giving notice thereof, within seven days, and entering into a recognizance, with sufficient surety, to appear and prosecute such appeal. § 14.

Nothing shall prevent any visiting justice from granting a certificate enabling any person discharged from prison to receive alms or relief upon his route to his place of settlement; provided such certificate be made under the directions of any act of parliament

for the regulation of gaols, &c.: and if any person having such certificate, shall act contrary to the directions thereof, or shall loiter upon his route, or deviate therefrom, he shall be deemed a *rogue and vagabond*. § 15.

No justice of peace, mayor, or other magistrate, shall grant to any other than persons entitled thereto under the 43 Geo. III. intituled, "*An act for the relief of soldiers, sailors, and marines, and of the wives of soldiers, &c.*" any certificate or other instrument enabling such persons to ask alms or relief in their route to any place, or for any other purpose whatever; and persons asking alms or relief under any certificate hereby prohibited, are liable to be declared idle and disorderly persons, in like manner as if they had possessed no such certificate. § 16.

No proceeding before any justice of the peace under this act shall be quashed for want of form. § 17.

Justices of the peace and all other officers are to have treble costs in any proceedings at law wherein the verdict is given for them, unless the court shall certify that there was reasonable cause of action. § 18.

And every action must be commenced within three calendar months. § 19.

Every person convicted under this act shall be deemed to be actually chargeable to the parish, township, or place in which such person shall reside, and shall be liable to be removed to the place of his or her last legal settlement by the order of two justices. § 20.

COMMON NUISANCES.

A common nuisance may be defined to be an offence against the public, either by doing a thing which tends to the annoyance of all the king's subjects, or by neglecting to do any thing which the common good requires.

All disorderly inns or ale-houses, bawdy-houses, gaming-houses, stage-plays, unlicensed booths, and stages for rope-dancers, mountebanks, and the like, are public nuisances, and may, upon indictment, be suppressed and fined.

By the 10 & 11 W. III. c. 17. all pretended lotteries are declared to be public nuisances, and all grants or licences for the same to be contrary to law.

By the 22 Geo. III. c. 47. no one shall keep an office for the sale of tickets in the public lottery, without a licence from the stamp-office, under the penalty of 100*l*. And if any person shall sell the chance or share of a ticket for less time than the whole time of drawing, or shall insure for or against the drawing of any ticket, or shall receive any money to return money or goods upon any contingency depending upon the tickets in the lottery, he shall forfeit 50*l*.

By the 42 Geo. III. c. 119. all lotteries called *Little Goes* are declared to be public nuisances; and if any one shall keep an office or place to exercise or expose to be played any such lottery,

or any lottery whatever not authorized by parliament, or shall knowingly suffer it to be exercised or played at in his house, he shall forfeit 500*l.* and be deemed a rogue and vagabond. And if any person shall promise to pay any money or goods on any contingency relative to such lottery, or publish any proposal respecting it, he shall forfeit 100*l.*

If any editor of a newspaper, or other person, advertises any illegal scheme of gaming in the lottery, he is subject to a penalty of 50*l.*

The making and selling of fire-works and squibs, or throwing them about in any street, is declared to be a common nuisance, by the 9 & 10 W. III. c. 7.; and the punishment is, for making and selling, 5*l.*; and for throwing or firing them, 20*s.*

It is a public nuisance to suffer any mischievous dog to go loose or unmuzzled; and the owner thereof may be indicted, and an action for damages will also in such case lie against him. But such action cannot be brought unless the owner had notice of his having bit somebody at least once before.

GAMING.

A *wager*, or *bet*, is a contract entered into, without colour or fraud, between two or more persons, for a good consideration, and upon mutual promises, to pay a stipulated sum of money, or to deliver some other thing to each other, according as some prefixed and equally certain contingency shall happen within the terms upon which the contract was made.

To restrain the pernicious effects of gambling, the 33 Hen. VIII. c. 9. § 11. and the 33 Geo. III. c. 24. enact, that no person, of what degree, quality, or condition soever, shall, by himself or agent, for his gain, lucre, or living, keep any house for playing at any game prohibited by any statute, or any new unlawful game afterwards invented, on pain of 40*s.* a day, and 6*s.* 8*d.* for every person frequenting such house. And the same statutes prohibit to all but gentlemen the games of tennis, tables, cards, dice, bowls, and other unlawful diversions therein specified, unless in the time of Christmas, under fine and imprisonment.

By the 16 Car. II. c. 7, if any person, by playing or betting at any game or pastime whatsoever (other than for ready money), lose more than 100*l.* at any one time or meeting, upon tick or credit, or otherwise, he shall not be compellable to pay the same; and the winner shall forfeit treble the value, one moiety to the king, and the other to the informer.

By the 9 Ann. c. 14. all bonds and other securities given for money won at play, or money lent at the time of play withal, shall be utterly void; and all mortgages and incumbrances of lands made upon the same consideration shall be and enure to the use of the heir of the mortgagor; and if any person at any one time or sitting lose 10*l.* at play, and shall pay the same, or any part thereof, he may recover it back from the winner; if the loser do not recover back the money so lost within three months, any other person may

recover the same, and treble the amount besides, with costs, one half for himself, the other half to the poor: and if a promissory note, or other security, has been given for money so lost, by the 18 Geo. II. c. 24. §3. such winner may, by bill in equity, be forced to discover the fact upon oath; and in any of these suits no privilege of parliament shall be allowed.

The 9 Ann. further enacts, that if any person, by cheating at play, shall win any money or valuable thing, or shall at any one time or sitting win more than 10*l.* he may be indicted thereupon, and shall forfeit five times the value to any person who will sue for it; and in case of cheating, shall be deemed infamous, and suffer such corporal punishment as in case of wilful perjury.

By several statutes of the reign of George II. viz. 12 Geo. II. c. 28; 13 Geo. II. c. 19; 18 Geo. II. c. 39. all private lotteries by tickets, cards, or dice, and particularly the games of faro, basset, ace of hearts, hazard, passage, rolly-polly, and other games with dice, except back-gammon, are prohibited, under a penalty of 200*l.* for him who shall erect such lotteries, and 50*l.* a time for the players.

The 13 Geo. II. c. 19. directs, that no plates or matches under 50*l.* value shall be run, upon penalty of 200*l.* to be paid by the owner of each horse running, and 100*l.* by such as advertise the plate. At Newmarket and Black Hambleton, however, a race may be run for any sum or stake less than 50*l.* But though such horse-races are lawful, yet it has been determined that they are games within the statute 9 Ann. c. 14. and that, of consequence, wagers above 10*l.* upon a lawful horse-race are illegal. A foot-race, and race against time, have also been held to be games within the statute of gaming. So a wager to travel a certain distance within a certain time, with a post-chaise and a pair of horses, has been considered of the same nature. A wager for less than 10*l.* upon an illegal horse-race is also void and illegal. And though the owners of horses may run them for a stake of 50*l.* or more, at a proper place for a horse-race, yet it has been held, if they run them upon the highway, the wager is illegal. By the 18 Geo. II. c. 34. the 9 Ann. is further enforced, and some deficiency supplied; the forfeitures of that act may now be recovered in a court of equity: and moreover, if any man be convicted, upon information or indictment, of winning or losing at play or betting at one time 10*l.* or 20*l.* within twenty-four hours, he shall be fined five times the sum, for the benefit of the poor of the parish.

By the 9 Geo. I. c. 19. if any person shall, by colour of any grant from any foreign prince, set up any lottery, or undertaking in the nature of a lottery, &c. he shall forfeit 200*l.* By 10 Hen. c. 26. § 109. no person shall keep any office or place for making insurances on marriages, births, christenings, &c. on pain of 500*l.* By 7 Geo. II. c. 8. all wagers relating to the present or future price of stocks are deemed illegal and void.

Wagers in general, by the common law, were lawful contracts; and all wagers may still be recovered in a court of justice, which

are not made upon games, or which are not such as are likely to disturb the public peace, or to encourage immorality, or such as will probably affect the interests, characters, and feelings of persons not parties to the wager, or such as are contrary to sound policy, or the general interests of the community.

THE GAME LAWS.

The *qualifications* for killing game, as they are usually called, or, more properly, the exemptions from the penalties inflicted by the statute law, arise either from an estate or certificate.

The estate required to exempt the possessors from the penalties of the game laws is specified by the statutes 13 Ric. II. c. 13; 1 Jac. I. c. 27; 7 Jac. I. c. 11; and 22 & 23 Car. II. c. 25.

By the 13 Ric. II. c. 13. it is enacted, that no layman who has not lands or tenements of the value of 40*s.* a year, or clergyman not being advanced to 10*l.* a year, shall have any greyhound, hound, or other dog, to hunt; nor shall use any ferrets, bags, nets, hare-pipes, cords, or other engines, for taking or destroying hares or coneys, or other gentlemen's game; on pain of one year's imprisonment, to be inflicted by the justices at their quarter sessions.

By the 1 Jac. I. c. 27. (repealed by the 48 Geo. III. c. 93. so far as concerns hares), it is provided that every person, unless seised in his own estate or his wife's right of an estate of inheritance of 10*l.* a year, or of a life estate of 10*l.* a year, or goods to the value of 200*l.* or unless he be the son of a lord or knight, or the son and heir apparent of an esquire, who shall keep any greyhound for coursing of deer or hare, or any setting dog, or net to take pheasants or partridges, shall forfeit 20*s.* to the poor, or be committed to gaol for three months, or, after one month's imprisonment, be bound with two sureties in 20*l.* each not to offend again.

By the 7 Jac. I. c. 11. every person having free warren, and every lord of a manor, and also every freeholder seised in his own or his wife's right of lands or hereditaments of the clear value of 40*l.* by themselves, or by their household servants duly authorized, may take pheasants or partridges in the day-time between Michaelmas and Christmas, on their own or master's free warren, manor, or freehold.

By the 22 & 23 Car. II. c. 5. it is enacted, that no person, not having lands or tenements or some other estate of inheritance of his own or his wife's right of the clear yearly value of 100*l.* or for a term of life, or having lease or leases of ninety-nine years, or for any longer term, of the clear yearly value of 150*l.* (other than the son and heir apparent of an esquire, or other person of higher degree, and the owners and keepers of forests, parks, chaces, or warrens being stocked with deer or coneys for their necessary use, in respect to the said forests, parks, chaces, or warren) shall have or keep, for themselves or any other person, guns, bows, greyhounds, setting dogs, ferrets, coney dogs, lurchers, bags, nets, low-bells, hare-pipes, gins, snares, or other engines for the taking or killing

of coneys, hares, pheasants, partridges, or other game, but shall be prohibited to have or use the same.

In the construction of the first clause of this statute, viz. "having lands or tenements, or other estate of inheritance, of the clear yearly value of 100*l*." it has been held, it is not necessary that it should be a freehold or a legal estate; for copyhold or an equitable estate of inheritance of the clear yearly value of 100*l*. is a qualification. But it is not sufficient if the value of the estate has been reduced below that sum by the interest of a mortgage or other incumbrance created by the owner, or by those under whom he claims.

In the second clause of the statute, "or for a term of life, or lease or leases for ninety-nine years, or for any longer term, of the clear yearly value of 150*l*. on the words, "or for a term of life," a doubt having arisen, whether they should be referred to the 100*l*. or to the 150*l*." per annum, the Court of King's Bench were of opinion, that from the statute 1 Jac. I. c. 27. it was evident, that the intention of the legislature was to make the yearly value of an estate for life greater than that of an inheritance; and thereupon decided, that a tenant for life must have 150*l*. per annum to exempt him from the penalties of the game laws.

An ecclesiastical living, which a man holds in right of his church, is a life estate within this act, although it may happen to be determined sooner, as by resignation, deprivation, or by accepting another living incompatible.

As to the third clause, "other than the son or heir apparent of an esquire, or other person of a higher degree," it has been decided, that though the eldest son of an esquire, or of any person of higher degree, is qualified without an estate, whilst his father is living, yet the father himself is not qualified without having the estate required by the statute.

It is unsettled what constitutes a real esquire; for it is not an estate, however large, that confers this rank upon its owner. According to Camden and Blount, esquires are, 1. The eldest sons of baronets, knights of the bath, and knights bachelor, and their heirs male in perpetual succession. 2. The younger sons of peers, and their heirs male in like perpetual succession. 3. Esquires created by the king's letter patent, or other investiture, and their eldest sons. 4. Esquires by virtue of their office, as justices of the peace, and others who bear any office under the crown. To these may be added, the esquires of knights of the bath, each of whom constitutes three at his installation; and all foreign, nay, Irish peers. Persons of higher degree than esquires are colonels, serjeants at law, doctors in the three learned professions, and barristers at law.

But it has been determined that a diploma from a Scotch university, appointing a person doctor of physic, will not give him a qualification within this statute. A doctor of physic of the English universities is not qualified as such. It has also been determined, that the words "other persons of higher degree" do not

relate to the esquire himself, but mean the son of an esquire, or the son of any person of higher degree.

By the 5 Ann. c. 14. which is the act most frequently resorted to, it is enacted, that if any person not qualified shall keep or use any dogs or engines to kill or destroy game, and shall thereof be convicted, on the oath of one credible witness, before one justice, he shall forfeit 5*l.* (half to the informer, and half to the poor), to be levied by distress; or, for want thereof, the offender to be sent to the house of correction for three months for the first offence, and for every other offence four months. And any justice of the peace, or lord or lady of manors, may take away any hare or other game, and likewise all dogs, guns, nets, &c. from any unqualified person to their own use.

And by the 22 & 23 Car. II. c. 25. § 2. it is enacted, that gamekeepers, or any other persons, by warrant of a justice of the peace, may, in the day-time, search the houses or other places of any such persons as are prohibited by this act to keep or use any dogs, nets, or other engines aforesaid, and seize and keep the same for the use of the lord of the manor, or otherwise destroy and cut them in pieces.

The courts have determined that—1. A qualified person may take out with him persons who are not qualified, to beat the bushes, and see a hare killed. 2. The statute being in the disjunctive, “keep or use,” the bare keeping one dog is an offence. 3. So the bare keeping a gun is within the act, provided it be used for killing game. 4. As to the using, it has been determined, that walking about with an intent to kill game is an using of the instrument or dog within the statute. 5. The using of a hound to destroy game is not within the act, for that species of dog is not mentioned in it. 6. An offender is liable only to one penalty, although he kill ever so many hares, &c. on the same day. 7. And where several unqualified persons offend by going out and killing a hare, it has been determined that only one penalty can be recovered.

By the 25 Geo. III. c. 50. and 31 Geo. III. c. 21. every person who shall go in pursuit of hares, pheasants, partridges, heath-fowl, or grouse, or any other game whatsoever, without having first delivered in his name and place of abode to the clerk of the peace of the county or district within which such person resides, and taken out a certificate, shall forfeit 20*l.* And here it is necessary to remark, that the certificate will not authorize any qualified persons to kill game out of season.

This act has been modified by the 48 Geo. III. c. 55; and other birds, *viz.* woodcocks, snipes, quails, landrails, or any coney, in any part of Great Britain, are designated as game; and the duties (*viz.* for a qualified person £3. 13*s.* 6*d.* § 12. and for a game-keeper 1*l.* 5*s.*) are directed to be paid to the collectors of the duties for the parish, ward, or place, where the person so qualified shall reside, on pain of forfeiting 20*l.* over and above the duty; and the collector shall, on payment of the duty, give a

receipt for the same, for which receipt he shall be entitled to demand 1s. over the duty as a compensation.

And by the 10th section of this act, if any person shall be found using any dog, gun, &c. for any of the purposes mentioned in this act, whereof such person shall be chargeable, by any assessor or collector of the parish, where any such person shall then be, it shall be lawful for the assessor, collector, commissioner, or game-keeper, inspector or surveyor, or other person assessed as aforesaid, or the owner, landlord, lessee, or occupier of the land, to demand and require from the person so using such dog, gun, &c. the production of a certificate; which certificate every such person is hereby required to produce to the person so demanding the same, and permit him to read the same, and (if he shall think fit) to take a copy thereof; or in case no certificate shall be produced to the person demanding the same, then it shall be lawful for the person having made such demand to require the person so using such dog, gun, &c. to declare to him his christian and surname, and place of residence, and the parish or place (if any) in which he shall have been assessed to the duties by this act; and if any such person shall, after such demand, wilfully refuse to produce and shew a certificate, or, in default thereof, shall produce any false or fictitious certificate, or give any false or fictitious name, place of residence, or place of assessment, every such person shall forfeit the sum of 20*l*.

The persons prohibited from killing game are persons of mean estate, inferior tradesmen, and officers and soldiers.

By the 4 & 5 W. & M. c. 23. § 10. it is enacted, if any inferior tradesman, apprentice, or other dissolute person, shall hunt, hawk, fish, or fowl, (unless in company with the master of such apprentice duly qualified), such person may be sued for their wilful trespass of coursing on any person's ground, and if found guilty shall pay the full costs, although they have done no injury to the soil by so trespassing.

Who are, or who are not, inferior tradesmen under this statute, is a question for the jury.

And by the 4 & 5 W. & M. c. 23. § 3. every constable, headborough, or tithing-man, being authorized by one justice of the peace, is empowered to enter and search the houses of suspected persons not qualified; and in case any hare, partridge, pheasant, pigeon, fish, fowl, or other game except rabbits, shall be found, the offenders shall be carried before a justice of the peace; and if they do not give a good account how they came by such game, or shall not, in convenient time, to be named by the justice, produce the party of whom they bought the same, or procure some creditable person to depose upon oath the sale thereof, they shall be convicted by the said justice of such offence, and shall forfeit for every hare, partridge, fish, or other game, any sum not under 5*s*. nor more than 20*s*. (one moiety to be paid to the informer, and the other to the poor of the parish where the offence is committed) to be levied by distress under warrant of the justice; and, for want

of distress, the offender shall be committed to the house of correction, for any time not exceeding one month, nor less than ten days, there to be whipt and kept to hard labour.

Having considered the game laws as they relate to the qualifications, we shall endeavour to shew in what manner the legislature has interposed for the *preservation* and *protection* of game.

Deer.—For the general preservation of the deer, it is enacted by the 28 Geo. II. c. 19. that if any person shall unlawfully set fire to, burn, or destroy, or assist in so doing, any furze, goss, or fern, in forests or chases kept for the preservation of deer, he shall forfeit a sum not exceeding 5*l.* nor less than 40*s.* or, on default of payment, be committed to the county gaol for a time not greater than three months, nor less than one.

And by the 9 Geo. I. c. 22. commonly called the Black Act, if any person being armed and disguised shall appear in any forest, chase, park, paddock, or inclosed grounds where deer are or have been usually kept, or shall unlawfully hunt, kill, or steal, any red or fallow deer; or if any persons, whether armed or disguised, or not, shall unlawfully and wilfully hunt, wound, kill, destroy, or steal, any red or fallow deer, fed or kept in any places in any of the king's forests or chases which are inclosed with rails or pales, or in any park, paddock, or ground inclosed where deer have been usually kept; or shall forcibly rescue any offender, or procure another to join in any of the said offences; he shall be guilty of felony without benefit of clergy. But the severity of this act is now softened by the 4 Geo. IV. c. 54. and the offender is liable to be transported for seven years, or to be imprisoned only, or to be imprisoned and kept to hard labour, for any term not exceeding three years.

And by the 16 Geo. III. c. 30. and 42 Geo. III. c. 107. to course, hunt, or take in any snare, or to kill, wound, or destroy, or to attempt so to do, or to carry away, any red or fallow deer in any forest, chase, purlieu, or ancient walk, whether inclosed or not, or knowingly to assist in such offence, without the consent of the owner of such deer, or without being duly authorized, subjects the offender to transportation for seven years. To wilfully pull down or destroy, or cause to be pulled down or destroyed, the paling or wall of any forest or ground where any red or fallow deer are kept, or to be discovered with the unlawful possession of any red or fallow deer, renders the offender liable to several pecuniary penalties.

And, as a further preventative against the destruction of deer, the ranger or keeper of other places where deer are kept is empowered to take from persons trespassing thereupon all guns, fire-arms, slips, nooses, toils, snares, engines, and dogs, in like manner as gamekeepers are empowered by 22 & 23 Car. III. c. 25. § 2. to take dogs, nets, and other engines, from persons not duly qualified to carry or use the same, and also to detain and carry before a justice the person having the same; and if any person shall hurt or wound the ranger or keeper, or his assistants, in the exercise of

such authority, or attempt to rescue any offender in his custody, he shall be guilty of felony, and transported for seven years.

Hares.—By 14 & 15 Hen. VIII. c. 10. it is enacted, that no person of whatsoever estate, degree, or condition he be, shall trace, destroy, or kill any hare in the snow, upon pain of forfeiting, for every hare so killed, the sum of 6s. 8d.

By 1 Jac. I. c. 27. every person who shall trace or course any hares in the snow, or destroy them with snares, shall be committed to gaol for three months, unless he pay to the churchwardens, for the use of the poor, the sum of 20s. for every hare he shall so take or destroy; or, after one month from his commitment, become bound with two sureties in 20l. a-piece, not to offend in like manner.

And by 22 & 23 Car. II. c. 25. § 6. if any person shall be found setting or using any snares and shall be thereof convicted within a month after the offence committed, he shall pay damages to the party injured, at the discretion of the magistrate before whom he has been convicted, and shall further pay down immediately a sum not exceeding 10s. to the use of the poor of such parish as the justice shall appoint, or else shall be committed to the house of correction for a time not exceeding one month.

Coneys, or Rabbits.—By 3 Jac. I. c. 13. it is enacted, that if any person shall, in the night-time, enter into any grounds inclosed with a wall, pale, or hedge, and used for the keeping of coneys, and unlawfully hunt, drive out, take, or kill any coneys, against the will of the owners, he shall be imprisoned three months, and pay to the party grieved treble damages and costs; and shall find sureties for his good demeanour for seven years, or remain in prison till he does.

By 22 & 23 Car. II. c. 25. § 4. if any person shall at any time enter wrongfully into any warren or ground unlawfully used for breeding or keeping of coneys, whether it be inclosed or not, and there take, chase, or kill any coneys, against the will of the owner or occupier, not having lawful title so to do, and shall be thereof convicted within one month after such offence, he shall yield to the party grieved treble damages, be imprisoned three months, and so long afterwards till he find sureties for his good behaviour.

And by 5 Geo. III. c. 14. § 6. if any person shall enter in the night-time into any such warren or grounds, and take or kill any coney, against the will of the owner of the said grounds, or shall be aiding or assisting therein, he shall be transported for seven years, or suffer such other less punishment, by whipping, fine, or imprisonment, as the court shall award.

By 9 Geo. I. c. 22. if any person being armed and disguised shall appear in any warren or place where coneys are usually kept, or shall rob such warren; or shall, though not armed and disguised, rescue any person in custody for such offence, or procure any person to join him therein; he shall be guilty of felony without benefit of clergy. But the severity of this act, is, by the enlightened humanity of our modern legislators, much mitigated,

and the offender (as in many other instances) is made liable to be transported for seven years, or to be imprisoned only, or to be imprisoned and kept to hard labour for any time not exceeding three years.

By 22 & 23 Car. II. c. 25. § 5. no person shall take or kill, in the night-time, any coney upon the borders of warrens or other grounds lawfully used for the breeding or keeping of coney, except such person be owner of the soil, or lawful possessor of the ground whereupon such coney shall be killed, or be by him employed, on pain of damages to the party grieved, and 10s. to the poor; or, in default thereof, be committed to the house of correction for a term not exceeding one month.

The statute says, "upon the borders of warrens;" therefore if rabbits come upon a man's ground from a warren elsewhere, and damage his corn or herbage, he may lawfully kill them. But he is not justified in killing them for feeding upon a common to which he may be entitled to commonage.

By the 6th section of the same statute, if any person shall be found setting or using any snares for the taking of coney, he shall be liable to the same penalties as above mentioned.

And by 3 Jac. I. c. 13. § 1. if any person not having lands or hereditaments of 40l. a year, or not worth in goods 200l. shall use any gun or cross-bow to kill coney, or shall keep any engines, bags, nets, ferrets, or coney dogs, (except he have grounds inclosed for keeping of coney, the increase of which shall amount to 40s. a year to be let, and except warreners in their warrens), in such case any person having hereditaments in fee, in tail, or for life, of the yearly value of 100l. in his own right, or right of his wife, may lawfully seize the same to his own use.

Swans.—By 22 Edw. IV. c. 60. no person, other than the king's son, unless he have a freehold of five marks a year, shall have any marks or game of swans, on pain of forfeiting the swans.

It is felony to take any swans that are lawfully marked, although they be at large; and so it is as to swans unmarked, if they be domesticated and tamed, that is, kept in a mote or pond near to the dwelling-house, or so long as they keep within a man's manor, or within his private rivers, or even if they happen to escape, and are pursued and brought back again; but if swans unmarked are at their natural liberty, then the property of them is lost, and felony cannot be committed by taking them. And yet such wild and unmarked swans may be seized by the king's officers to his use, by his prerogative. The king also may grant them, and by consequence another may prescribe to have them, within a certain precinct or place.

By 1 Jac. I. c. 27. § 2. every person who shall take the eggs of any swans out of the nest, or willingly spoil them in the nest, shall be committed to gaol for three months, unless he pay to the churchwarden, to the use of the poor, twenty shillings for every egg; or, after one month after his commitment, become bound by

recognizance, with two sureties in 20*l.* each, not to offend in like manner again.

And by 11 Hen. VII. c. 17. no person shall take, or cause to be taken, on his own ground, or any other man's, the eggs of any swan, on pain of imprisonment for a year and a day, and fine at the king's will.

Partridges and Pheasants.—By 11 Hen. VII. c. 17. no person, of whatsoever condition, shall take, or cause to be taken, any pheasants or partridges by nets, snares, or other engines, out of his own warren, upon the freehold of any other person, without the special licence of the owner of the same, on pain of 10*l.*

By 1 Jac. I. c. 27. § 2. every person who shall shoot at, kill, or destroy any pheasant or partridge with any gun or bow, or shall take, kill, or destroy them with setting dogs or nets, or with any manner of nets, snares, engines, or instruments whatsoever, or shall take their eggs out of their nest, shall be imprisoned three months, or pay 20*s.* for every partridge, pheasant, or egg, to the use of the poor; or, after one month's imprisonment, be bound, with two sureties, in 20*l.* each, not to offend again.

By 7 Jac. I. c. 11. § 8. every person, who shall take, kill, or destroy any pheasant or partridge with setting dogs and nets, or with any nets, snares, or engines, shall forfeit the like sum, and enter into the like sureties.

Pigeons.—By 1 Jac. I. c. 27. § 2. every person who shall shoot at, kill, or destroy any house-dove, or pigeon, with any gun or bow, or shall take, kill, or destroy the same with setting dogs, or nets, or with any manner of nets, snares, or engines, shall be committed to gaol for three months, unless he pay 20*s.* for every pigeon to the use of the poor.

By 2 Geo. III. c. 29. if any person shall shoot at, with intent to kill, or by any means kill, or take with a wilful intent to destroy, any house-dove or pigeon, he shall forfeit 20*s.* and if not immediately paid, be committed to the common gaol or house of correction, and kept to hard labour for a term not exceeding three calendar months, nor less than one.

But, notwithstanding the provisions of the above acts, the owner of the land may kill such pigeons as he shall find thereon destroying his corn.

Wild Ducks, Wild Geese, &c.—By 1 Jac. I. c. 27. § 2. every person who shall shoot at, kill, or destroy, with any gun or bow, any mallard, duck, teal, or widgeon, and the offence be proved by the confession of the party, or by the testimony of two witnesses upon oath, before two justices of the place where the offence shall be committed, the party apprehended shall be imprisoned three months, unless he pay to the churchwarden of the parish where the offence was committed, or where he was apprehended, twenty shillings for each fowl, to the use of the poor; or, within a month after commitment, become bound, with two sureties in 20*l.* each, not to offend again.

Heath-Fowl, Grouse, and Bustards.—By 1 Jac. I. c. 27. § 2.

if any person shall shoot at, kill, or destroy, with any gun or bow, any grouse, heath-cock, or moor-game, he shall be subject to the same penalties as are provided for the protection of wild ducks, wild geese, &c.

Heron.—By 1 Jac. I. c. 27. § 2. to shoot at, kill, or destroy any heron, with gun or bow, incurs a penalty of 20*s.* for each heron.

By 19 Hen. VII. c. 11. no person without his own ground shall take or cause to be taken, by means of any craft or engine, any heron, unless it be with hawking, or with long bows, on pain of 6*s.* 8*d.*; neither shall any person without his own ground take any young herons out of the nest, on pain of 10*s.* for every young heron.

Other Fowl.—By 25 Hen. VIII. c. 11. it is enacted, that no manner of person shall, from the 1st day of March to the last day of June in every year, by day or night take or destroy any eggs of any kind of wild fowl from or in any nest or place where they shall chance to be laid, on pain of imprisonment for a year, and forfeiture of 20*d.* for every egg of a crane or bustard; 8*d.* for every egg of a bittern, heron, or shovelard; and 1*d.* for every egg of a mallard, teal, or other wild fowl, except crows, ravens, foscards, and other fowl not used to be eaten.

And, by 1 Jac. I. c. 27. § 2. any person who shall take the eggs of any pheasant or partridge out of the nest, or willingly break, spoil, or destroy the same in the nest, shall, on conviction before two justices, be imprisoned for three months, unless he pay to the use of the poor 20*s.* for every egg; or, within one month after his commitment, become bound, with two sureties in 20*l.* each, not to commit the like offence again.

By the 9 Ann. c. 25. § 4. and 10 Geo. III. c. 32. it is enacted, that if any person whatsoever shall, by bags, tunnels, or other nets, drive and take any duck, teal, widgeon, or any other water fowl, in any place of resort for wild fowl, in the moulting season, between the first of June and the first of October yearly, he shall, on conviction, forfeit 5*s.* for every fowl; and the bags, nets, or tunnels, used in driving or taking such fowl, shall be destroyed.

By 2 Geo. II. c. 19. § 1. and 19 Geo. III. c. 34. no person shall, upon any pretence whatever, take, kill, destroy, carry, sell, buy, or have in his possession or use, any partridge or pheasant, between the 1st of February and the 1st of September yearly, on pain of forfeiting 5*l.* for every such fowl, with full costs of suits. But this is not to extend to any pheasant taken in the proper season allowed by these acts, and kept in a mew or breeding-place.

By 13 Geo. III. c. 55. no person shall take, kill, destroy, carry, sell, buy, or have in his possession or use, any heath-fowl, commonly called black game, between the 10th of December and the 20th of August, (in the New Forest, county of Southampton, and in the counties of Somerset and Devon, by 50 Geo. III. c. 55. the time within which heath-fowl may be taken is between De-

ember 10th and September 1st;) nor any grouse, commonly called red game, between the 10th of December and 12th of August; nor any bustard, between the 1st of March and the 1st of September in any year; on pain of forfeiting not more than 20*l.* nor less than 10*l.* for the first offence, and for every subsequent offence not more than 30*l.* nor less than 20*l.*; or, in default thereof, to be imprisoned for any time not exceeding six months, nor less than three.

And for the better preserving of black game and grouse, by 4 & 5 W. III. c. 23. § 11. to burn, between the 2d of February and the 24th of June, any greig, ling, heath, furze, goss, or fern, on any mountains, hills, heaths, moors, forests, chaces, or other wastes, incurs imprisonment for any time not exceeding one month nor less than ten days, with whipping and hard labour.

By 23 Eliz. c. 10. if any person, of whatsoever estate, degree, or condition, shall take, kill, or destroy any pheasants or partridges in the night time, he shall forfeit for every pheasant, 20*s.* and for every partridge, 10*s.*; half to him that shall sue, and half to the lord of the manor, unless such lord shall license or procure the said taking or killing, in which case the said half shall go to the poor, &c.

By 9 Ann. c. 25. § 2. if any person whatsoever shall take or kill any hare, pheasant, partridge, moor-game, heath-game, or grouse, in the night-time, he shall, on conviction, forfeit 5*l.* (half to the informer, and half to the poor of the parish), to be levied by distress; or, for want thereof, be sent to the house of correction for three months for the first offence, and for every subsequent offence four months.

But these penalties being found insufficient, it was enacted by the 13 Geo. III. c. 80. § 1. that if any person shall, knowingly and wilfully, kill, take, or destroy, or use any gun, dog, snare, net, or other engine, with intent to kill, take, or destroy any hare, pheasant, partridge, moor-game, or heath-game, in the night-time, viz. between seven o'clock at night and six in the morning from the 12th of October to the 12th of February, and between nine o'clock at night and four in the morning from the 12th of February to the 12th of October; or in the day-time, on a Sunday or Christmas day; he shall, on conviction, forfeit for the first offence, a sum not exceeding 20*l.* nor less than 10*l.*; for the second, not exceeding 30*l.* nor less than 20*l.*; and for the third and every subsequent offence, 50*l.*; or, on default of payment, be imprisoned for not less than six months, nor more than twelve, and be whipped at the end of the imprisonment.

By the 57 Geo. III. c. 97. it is enacted, that if any person or persons, having entered into any forest, chase, park, wood, plantation, close, or other open or inclosed ground, with the intent illegally to destroy, take, or kill game or rabbits, or with the intent to aid, abet, and assist any person or persons illegally to destroy, take, or kill game or rabbits, shall be found at night, (that is to say, between the hours of six in the evening and seven in the

morning from the first of October to the first of February, between seven in the evening and five in the morning from February the first to the first of April, and between nine in the evening and four in the morning for the remainder of the year), armed with any gun, cross-bow, fire-arms, bludgeon, or any other offensive weapon; every person so offending, being lawfully convicted, shall be transported for seven years, or shall receive such other punishment as may by law be inflicted on persons guilty of a misdemeanor, and as the court shall adjudge. And if any such offender shall return before the expiration of the term for which he shall be so transported, he, being thereof duly convicted, shall be adjudged guilty of felony, and shall be sentenced to transportation for life. § 1.

And it shall be lawful for the rangers, and for the owners and occupiers of any such forest, chace, park, wood, plantation, close, or other open or inclosed ground, and also for their keepers and servants, and also for any other persons, to seize or to assist in seizing such offenders, by virtue of this act, and by the authority of the same to convey such offenders into the custody of a peace-officer, who is to convey such offenders before one justice; or, in case such offenders shall not be so apprehended, then it shall be lawful for any such justice, on information on oath, to issue his warrant for the apprehension of such offenders; and if, upon apprehension, it shall appear to such justice, on oath, that the persons so charged have been guilty of the crime of being found armed at night as aforesaid, it shall be lawful for such justice to admit such persons to bail, and in default of bail to commit them to the county gaol until the next general or quarter sessions, or the next general commission of gaol-delivery, there to be tried; and if in Scotland, until such persons shall be dealt with as any persons charged with a transportable offence may be dealt with according to the law of Scotland. § 2.

If any person shall unlawfully enter into or be found in any forest, chace, park, wood, plantation, close, or other open or inclosed ground, at night, according to the provisions of this act, having any net, engine, or other instrument, for the purpose and with the intent to destroy, take, or kill, or shall wilfully destroy, take, or kill, game; it shall be lawful for the rangers, and for the owners and occupiers, and also for their keepers and servants, and also for any other persons, to seize or assist in seizing such offenders by virtue of this act, and by the authority of the same convey such offenders into the custody of a peace-officer, who is to convey such offenders before one justice, to be dealt with according to law. § 3.

By 1 Jac. I. c. 27. § 4. it is enacted, that if any person shall sell, or buy to sell again, any deer, hare, partridge, or pheasant, (except the partridges and pheasants be reared or brought up in houses, or brought from abroad), he shall, on conviction, forfeit for every deer 40s. for every hare 20s. for every partridge 10s. and for every pheasant 20s.; half to him that will sue, and half to the poor of the parish.

By the 5 Ann. c. 15. § 2. any higgler, chapman, carrier, inn-

keeper, victualler, or alehouse-keeper, who shall have in his custody any hare, pheasant, partridge, moor-game, heath-game, or grouse, or who shall buy, sell, or offer to sell, any such hare, pheasant, &c. shall, on conviction, forfeit for every hare, pheasant, &c. the sum of 5*l.* (one half to be paid to the informer, and the other half to the poor of the parish), to be levied by distress; and, in default thereof, the offender to be imprisoned in the house of correction for three months for the first offence, and four months for every subsequent offence. But this is not to extend to any carrier, where such game has been sent by persons qualified to kill game.

And by the 28 Geo. II. c. 12. § 1. it is provided, that if any one, whether qualified or not qualified to kill game, shall sell, expose, or offer to sell, any hare, pheasant, or partridge, moor, heath-game, or grouse, he shall, for every such offence, be liable to the penalties of the statute 5 Ann. above mentioned.

By 58 Geo. III. c. 75. § 1. if any persons, whether qualified or not, shall buy game, they shall forfeit 5*l.* And, for the better discovery of such persons, by § 2. of the same act it is enacted, that any person who shall buy, sell, or offer to sell, or who will inform within six months of any person who has bought or sold any game, such discoverer shall receive the same advantage as any other informer, and be exempt from the penalties incurred by the act, provided no prior prosecution had been commenced against him.

CHAPTER XIII.

Of Offences against the Persons and Property of Individuals.

HOMICIDE.

HOMICIDE, or the killing of any human creature, is of three kinds; justifiable, excusable, and felonious.

Justifiable homicide is of divers kinds:—

Such as is owing to some unavoidable *necessity*, without any will, intention, or desire, and without any inadvertence or negligence in the party killing, and without any shadow of blame.

Homicide committed for the *advancement of public justice*, or where an officer in the execution of his office, either in a civil or criminal case, kills a person that assaults or resists him; or, if an officer or any private person attempt to take a man charged with felony, and is resisted, and in the endeavour to take him kills him.

Where the prisoners in a gaol, or going to a gaol, assault the gaoler or officer, and he in his defence kills any of them, it is justifiable. If trespassers in forests, parks, chaces, or warrens, will not surrender themselves to the keepers, they may be slain.

But in all these cases there must be an apparent necessity on the officer's side; viz. that the party could not be arrested or apprehended, the riot could not be suppressed, the prisoners could not be kept in hold, the deer-stealers could not but escape, unless such homicide were committed.

Such homicide as is committed for the *prevention* of any forcible and atrocious crime is justifiable by the law of nature as well as by the law of England; as, if a person attempt a robbery or murder of another, or attempt to break open a house *in the night-time*, (which extends also to an attempt to burn it), and shall be killed in such attempt, the slayer shall be acquitted and discharged.

This reaches not to any crime unaccompanied with force, as picking of pockets; or to the breaking open of any house *in the day-time*, unless it carry with it an attempt at robbery also. A woman also is justified in killing one who attempts to ravish her; and so too the husband or father may justify killing a man who attempts a rape upon his wife or daughter; but not if he take them in adultery by consent; for the one is forcible and felonious, but not the other.

Excusable homicide is either *per infortunium*, by misadventure; or *se defendendo*, upon a principle of self-preservation.

Homicide by *misadventure* is, where a man doing a lawful act, without any intention of hurt, unfortunately kills another; as, where a man is at work with a hatchet, and the head thereof flies off, and kills a stander-by; or where a person qualified to keep a gun is shooting at a mark, and undesignedly kills a man; for the act is lawful, and the effect is merely accidental.

So where a parent is moderately correcting his child, a master his apprentice or scholar, or an officer punishing a criminal, and happens to occasion his death, it is only a misadventure, for the act of correction was lawful; but if he exceed the bounds of moderation, either in the manner, the instrument, or the quantity of punishment, and death ensue, it is manslaughter at least, and in some cases (according to the circumstances) murder.

Likewise, to whip another's horse, whereby he runs over a child and kills him, is held to be accidental in the rider, but manslaughter in the person who whipped him, for the act was a trespass, and at best a piece of idleness, of inevitably dangerous consequence. And, in general, if death ensue in consequence of an idle, dangerous, and unlawful sport, as shooting or casting stones in a town, or the barbarous diversion of cock-throwing; in these and similar cases, the slayer is guilty of manslaughter.

Homicide *in self-defence*, upon a sudden affray, is also excusable, rather than justifiable, by the English law. This self-defence is that whereby a man may protect himself from an assault, or the like, in the course of a sudden brawl or quarrel, by killing him who assaults him. This right of natural defence does not imply a right of attacking; for, instead of attacking one another for injuries past or impending, men need only have recourse to the proper tribunals of justice. They cannot therefore legally exercise this right of preventive defence, but in sudden and violent

cases, when certain and immediate suffering would be the consequence of waiting for the assistance of the law. Wherefore, to excuse homicide by the plea of self-defence, it must appear that the slayer had no other possible (or, at least, probable) means of escaping from his assailant.

Under this excuse of self-defence, the principal civil and natural relations are comprehended; therefore master and servant, parent and child, husband and wife, killing an assailant in the necessary defence of each other respectively, are excused.

Felonious homicide is an act of a very different nature from the former; being the killing of a human creature, of any age or sex, without justification or excuse. This may be done either by killing one's self or another man; which last species is again divided into *manslaughter* and *murder*.

SELF-MURDER.

Self-murder the law has ranked among the highest crimes, making it a peculiar species of felony, a felony committed on one's self. And this admits of accessaries before the fact, as well as other felonies; for if one persuade another to kill himself, and he does so, the adviser is guilty of murder. A *felo de se* therefore is he that deliberately puts an end to his own existence, or commits any unlawful malicious act, the consequence of which is his own death; as if, in attempting to kill another, he run upon his antagonist's sword; or shooting at another, the gun bursts and kills himself.

The punishment for this crime is a forfeiture of all his goods and chattels to the king: and this forfeiture has relation to the time of the act done in the felon's life-time, which was the cause of his death. As, if husband and wife be possessed jointly of a term of years in land, and the husband drown himself, the land shall be forfeited to the king, and the wife shall not have it by survivorship; for, by the act of casting himself into the water, he forfeits the term; which gives a title to the king prior to the wife's title by survivorship, which could not accrue till the instant of her husband's death.

Formerly the punishment for this crime was an ignominious burial in the king's highway, with a stake driven through the body: but now by the 4 Geo. IV. c. 32. it is enacted, that it shall not be lawful for any coroner, or other officer, to issue any warrant or other process directing the interment of the remains of persons against whom a finding of *felo de se* shall be had in any public highway; but such coroner shall give directions for the private interment of the remains, without any stake being driven through the body, in the church-yard or other burial ground of the parish in which the remains of such person might by the laws or customs of England be interred if the verdict of *felo de se* had not been found; such interment to be made within twenty-four hours from the finding of the inquisition, and to take place between the hours of nine and twelve at night. § 1.

But nothing herein shall authorize the performing of any of the rights of Christian burial on the interment of the remains of any such person; nor shall any thing hereinbefore contained be taken to alter the laws or usages relating to the burial of such persons, except so far as relates to the interment of such remains in such church-yard or burial ground, at such time and in such manner as aforesaid. § 2.

MANSLAUGHTER.

Manslaughter is the unlawful killing of another, without malice either express or implied; which may be either voluntary, upon a sudden heat; or involuntary, but in the commission of some unlawful act.

As to the first or *voluntary* branch: if upon a sudden quarrel two persons fight, and one of them kill the other, this is manslaughter; and so it is, if they upon such an occasion go out and fight in a field, for this is one continued act of passion. So also if a man be greatly provoked, as by pulling his nose, or other great indignity, and immediately kill the aggressor; though this is not excusable *se defendendo*, since there is no absolute necessity for doing it to preserve himself, yet neither is it murder, for there is no previous malice: but it is manslaughter. But in this, and in every other case of homicide upon provocation, if there be a sufficient cooling time for passion to subside, and reason to interpose, and the person so provoked afterwards kill the other, this is deliberate revenge, and not heat of blood, and accordingly amounts to murder.

So if a man take another in the act of adultery with his wife, and kill him directly upon the spot, it is manslaughter; it is, however, the lowest degree of it. Manslaughter, therefore, on a sudden provocation, differs from excusable homicide *se defendendo* in this; that in one case there is an apparent necessity, for self-preservation, to kill the aggressor; in the other, no necessity at all, being only a sudden act of revenge.

Involuntary manslaughter differs also from homicide excusable by misadventure in this; that misadventure always happens in consequence of a lawful act, but this species of manslaughter in consequence of an unlawful one. As if two persons play at sword and buckler, and one of them kill the other; this is manslaughter, because the original act was unlawful: but it is not murder, for one had no intent to do the other any personal mischief. So where a person does an act lawful in itself, but in an unlawful manner, and without due caution and circumspection; as when a workman flings down a stone or piece of timber into the street, and kills a man; this may be either misadventure, manslaughter, or murder, according to the circumstances under which the original act was done: if it were in a country village, where few passengers are, and he called out to all people to have a care, it is a misadventure only; but if it were in London, or other populous town, where people are continually passing, it is man-

slaughter, though he gave loud warning; and murder, if he knew of their passing, and gave no warning at all, for then it is malice against all mankind. And, in general, when an involuntary killing happens in consequence of an unlawful act, it will be either murder or manslaughter, according to the nature of the act which occasioned it. If it be in prosecution of a felonious intent, or in its consequences naturally tended to bloodshed, it will be murder; but if no more was intended than a mere civil trespass, it will only amount to manslaughter.

The crime of manslaughter amounts to felony, but within the benefit of clergy; and the offender was to be burnt in the hand, and forfeit all his goods and chattels. But by the 19 Geo. III. c. 74. instead of burning in the hand, the court may, if it think fit, impose a moderate pecuniary fine; and this fine shall have the same legal effect and consequences as burning in the hand.

But now, by the 3 Geo. IV. c. 38. § 1. whenever any person shall be lawfully convicted of the offence of manslaughter, such persons shall not be liable to be burned or marked in the hand, or in any part thereof, but such person shall be liable to be transported beyond the seas for the term of his or her natural life, or for any term of years, as the court before which any such person shall be convicted shall adjudge; or shall be liable, in case the said court shall think fit, to be imprisoned only, or to be imprisoned and kept to hard labour, in the common gaol, house of correction, or penitentiary house, for any term not exceeding three years; or shall be liable to such a pecuniary fine as to the said court, in its discretion, shall seem meet.

MURDER.

Murder arises from the deliberate wickedness of the heart, and is defined to be, "when a person of sound memory and discretion unlawfully kills any reasonable creature in being, and under the king's peace, with malice aforethought, either express or implied."

Malice is the great criterion by which murder is distinguished from every other kind of homicide; for, as we have already shewn, homicide may be founded in the dispensations of public justice, occasioned by mere accident, done for self-preservation, arising from a sudden transport of passion, or lastly be committed in malice. Express malice is that deliberate intention to take away the life of a fellow-creature which is manifest by external circumstances, capable of proof; as lying in wait, attendant menaces, former grudges, and concerted schemes to do him some bodily harm. If a person kill another in consequence of such a wilful act as shews him to be an enemy to all mankind in general; as going deliberately, and with an intent to do mischief, upon a horse used to strike, or coolly discharging a gun among a multitude of people; and if two or more come together to do an unlawful act against the king's peace, of which the probable consequences might be bloodshed, as to beat a man, to commit a riot, or to rob a park, and one of them kill a man, it is murder in them all, because of the unlawful act.

Implied malice is that inference which arises from the nature of the act, though no particular malice can be proved. If a man kill another suddenly, without any, or without a considerable provocation, the law implies malice. No affront by words or gestures only is a sufficient provocation, so as to excuse or extenuate such acts of violence as manifestly endanger the life of another. But if the person so provoked had unfortunately killed the other, by beating him in such a manner as shewed only an intent to chastise, and not to kill him, the law so far considers the provocation of contumelious behaviour, as to adjudge it only manslaughter, and not murder.

In like manner, if one kill an officer of justice, either civil or criminal, in the execution of his duty, or any of his assistants endeavouring to conserve the peace, or any private person endeavouring to suppress an affray or apprehend a felon, knowing his authority or the intention with which he interposes, the law will imply malice, and the killer will be guilty of murder.

And if one intend to do a felony, and undesignedly kill a man, this is also murder. Thus, if one shoot at A, and miss him, but kill B, this is murder, because of the previous felonious intent, which the law transfers from one to the other. The same is the case where one lays poison for A, and B (against whom the prisoner had no malicious intent) takes it, and it kills him.

And by the 43 Geo. III. c. 58. it is enacted, that if any person shall wilfully and maliciously administer to, or cause to be administered to, or taken by, any of his majesty's subjects any deadly poison, with intent to murder, he, his counsellors, aiders, and abettors, shall be guilty of felony without benefit of clergy.

And to attempt to murder by poison, which by the common law was only a misdemeanor, is now made a capital crime.

Also, if a man do such an act, of which the probable consequence may be, and eventually is, death; such killing may be murder, although no blow be struck by himself, and no killing may be primarily intended: as was the case of the unnatural son, who exposed a sick father to the air against his will, by reason whereof he died; of the harlot, who laid her child under leaves in an orchard, where a kite struck it, and killed it; of the parish officers, who shifted a child from parish to parish till it died for want of care and sustenance; and of the master, who refused necessary food and sustenance to his apprentice, and treated him with such continued harshness and severity as to occasion his death.

So, too, if a man have a beast that is used to do mischief, and he knowing it, suffers it to go abroad, and it kill a man; even this is manslaughter in the owner: but if he had purposely turned it loose, though barely to frighten people, and make what is called sport, it is murder.

But if a physician, surgeon, or apothecary, give his patient a potion or plaister to cure him, which, contrary to expectation, kills him; this is neither murder nor manslaughter, but misadventure; and he shall not be punished criminally, however liable he might formerly have been to a civil action for neglect or ignorance.

In order to make this killing murder, the party must die within a year and a day after the stroke received, or cause of death administered: in the computation of which the whole day upon which the hurt was done shall be reckoned the first.

And, to prevent the abominable practice of procuring abortions, by the 43 Geo. III. c. 58. it is enacted, that if any person shall wilfully and maliciously administer to, or cause to be administered to, or taken by, any woman, then quick with child, any noxious or destructive substance, with intent thereby to procure the miscarriage of her child, such person, and all who counsel, aid, and abet, shall be guilty of felony without benefit of clergy.

And to attempt, by administering drugs, to destroy a living infant in *ventre sa mere*, though it may in no degree be injured, is also punishable with death.

It is also enacted by the same statute, that where any medicines shall be so administered, or any instrument or other means shall be used to cause an abortion, and the woman shall not be, or shall not be proved to be, at the time, quick with child, then such offenders shall be guilty of felony, and shall be liable to be fined, imprisoned, set in the pillory, whipped, or to one or more of these punishments, or to be transported for any time not exceeding fourteen years.

The punishment of murder, and that of manslaughter, were formerly one and the same, both having the benefit of clergy. But now, by several statutes, the benefit of clergy is taken away from murderers through malice propense, their abettors, procurers, and counsellors. In atrocious cases, it is sometimes usual for the court to direct the murderer, after execution, to be hung upon a gibbet in chains, near the place where the fact was committed; but this is no part of the legal judgment. It is now enacted by the 25 Geo. III. c. 37. that the judge before whom any person is found guilty of wilful murder, shall pronounce sentence immediately after conviction, unless he see cause to postpone it, and shall in passing sentence direct him to be executed on the next day but one (unless the same shall be Sunday), and then on the Monday following), and that his body be delivered to the surgeons to be dissected and anatomized, and that the judge may direct his body to be afterwards hung in chains, but in no wise to be buried without dissection; and, during the short but awful interval between sentence and execution, the prisoner shall be kept alone, and sustained with only bread and water. But a power is allowed to the judge, upon good and sufficient cause, to respite the execution, and relax the other restraints of this act.

PETIT TREASON.

Petit treason, according to the 25 Edw. III. c. 2. may happen three ways: by a servant killing his master; a wife her husband; or an ecclesiastical person (either secular or regular) his superior, to whom he owes faith and obedience. A servant who kills his master whom he has left, upon a grudge conceived against him during his service, is guilty of petit treason; for the traitorous intention was hatched while the relation subsisted between them, and this is only an execution of that intention.

So if a wife be divorced *a mens et thero*, still the *vinculum matrimonii* subsists; and if she kill such divorced husband, she is a traitress. And a clergyman is understood to owe canonical obedience to the bishop who ordained him, to him in whose diocese he is beneficed; and also to the metropolitan of such suffragan or diocesan bishop; and therefore to kill any of these is petit treason.

The punishment of petit treason, in a man, is to be drawn and hanged, and in a woman, to be drawn and burnt.* Persons guilty of petit treason were first debarred the benefit of clergy by the 12 Hen. VII. c. 7. which has been since taken away from their aiders, abettors, and counsellors; by the 23 Hen. VIII. c. 1. and 4 & 5 P. & M. c. 4.

MAYHEM.

Mayhem is properly defined to be, the violently depriving another of the use of such members as may render him the less able in fighting, either to defend himself, or to annoy his adversary. And therefore the cutting off, or disabling, or weakening a man's hand or finger, or striking out his eyes, or fore-tooth, or depriving him of those parts the loss of which in all animals abates their courage, are held to be mayhems. But cutting off his ear, or nose, or the like, are not held to be mayhems at common law; because they do not weaken, but only disfigure him. By the 22 & 23 Car. II. c. 1. commonly called the Coventry Act, it is enacted, that if any person shall, of malice aforethought, and by lying in wait, unlawfully cut or disable the tongue, put out an eye, slit the nose, cut off a nose or lip, or cut off or disable any limb or member of any other person *with intent to maim or to disfigure him*, such person, his counsellors, aiders, and abettors, shall be guilty of felony without benefit of clergy.

And by 43 Geo. III. c. 58. if any person shall wilfully and maliciously stab or cut any of his majesty's subjects, with intent to murder, rob, maim, disfigure, or disable him, or to do him some grievous bodily harm, or with intent to resist or prevent the apprehension and detainer of the person so stabbing or cutting, or of any of his accomplices, for offences for which they might be lawfully apprehended, he, his counsellors, aiders, and abettors, shall be guilty of felony without benefit of clergy; provided, that if such acts of stabbing or cutting were committed under circumstances that, if death ensued, the same would not in law amount to the crime of murder, then the person so indicted shall be acquitted.

The act also extends the penalties to those who are guilty of

* By the 30 Geo. III. c. 48. women shall no longer be sentenced to be burnt; but in all cases of high and petit treason they shall be condemned to be drawn and hanged; and in petit treason they shall be subject, besides, to the same judgment, with regard to dissection and the time of execution, as is directed by the 25 Geo. II. c. 37. in case of murder. Soon after the passing the 25 Geo. II. c. 37. the majority of the judges agreed, that in the cases of men convicted of petit treason, the judgment introduced by that statute should be added to the common law judgment for petit treason. *Fost.* 107.

maliciously shooting at another, which is also a capital felony by the 9 Geo. I. c. 22.

FORCIBLE ABDUCTION AND MARRIAGE.

By 3 Hen. VII. c. 2. it is enacted, that if any person shall, for lucre, take any woman, being maid, widow, or wife, and having substance either in goods or lands, being heir apparent to her ancestors, contrary to her will, and afterwards she be married to such misdoer, or by his consent to another, or defiled; such person, his procurers and abettors, and such as knowingly receive such woman, shall be deemed principal felons; and by the 39 Eliz. c. 9. the benefit of clergy is taken away from all such felons, who shall be principals, procurers, or accessaries *before the fact*.

But now, by the 1 Geo. IV. the punishment is altered to transportation for life or seven years at the discretion of the court; or the offender is liable, if the court think fit, to be imprisoned only, or imprisoned and kept to hard labour, in the common gaol, penitentiary house, or house of correction, for any term not exceeding seven years.

In the construction of the statute, it hath been determined that the indictment must allege that the taking was *for lucre*. In order to shew this, it must appear that the woman has substance either real or personal, or is an heir apparent. It must appear that she was taken away against her will. It must also appear that she was afterwards married or defiled. And though the marriage or defilement might be by her subsequent consent, yet this is felony, if the first taking were against her will; and so, *vice versâ*, if the woman be originally taken away by her own consent, yet if she afterwards refuse to continue with the offender, and be forced against her will, she may from that time as properly be said to be taken against her will, as if she had never given any consent at all; for, till the force was put upon her, she was in her own power.

It is held, that a woman thus taken away and married may be sworn and give evidence against the offender, though he be her husband *de facto*, contrary to the general rule of law; because he is no husband *de jure*, in case the actual marriage was also against her will.

An inferior degree of the same kind of offence, but not attended with force, is punished by the 4 & 5 Ph. & Mar. c. 8. which enacts, that if any person above the age of fourteen unlawfully shall convey or take away any woman-child unmarried, within the age of sixteen years, from the possession and against the will of the father, mother, guardians, or governors, he shall be imprisoned two years, or fined at the discretion of the justices; and if he deflower such maid or woman-child, or without the consent of parents contract matrimony with her, he shall be imprisoned five years, or fined at the discretion of the justices; and she shall forfeit all her lands to her next of kin, during the life of her said husband. But the latter part of this act is now rendered almost useless by provisions of a very different

kind, which make the marriage totally void, in the statute 26 Geo. II. c. 33.

RAPE.

This crime, by the 18 Eliz. c. 7. is made felony without benefit of clergy; as is also the abominable wickedness of carnally knowing and abusing any woman-child under the age of ten years; in which case the consent or non-consent is immaterial, as by reason of her tender years she is incapable of judgment and discretion.

As to the material facts requisite to be given in evidence and proved upon an indictment of rape—

First, the party ravished may give evidence upon oath, and is in law a competent witness; but the credibility of her testimony, and how far she is to be believed, must be left to the jury, upon the circumstances of fact that concur in that testimony. For instance, if the witness be of good fame; if she presently discovered the offence, and made search for the offender; if the party accused fled for it: these and the like are concurring circumstances which give greater probability to her evidence. But, on the other side, if she be of evil fame, and stand unsupported by others; if she concealed the injury for any considerable time after she had opportunity to complain; if the place, where the fact was alleged to be committed was where it was possible she might have been heard, and she made no outcry; these, and the like circumstances, carry a strong, but not conclusive presumption, that her testimony is false or feigned.

Moreover if the rape be charged to be committed on an infant under twelve years of age, she may still be a competent witness, if she have sense and understanding to know the nature and obligations of an oath, or even to be sensible of the wickedness of telling a deliberate lie.

CRIME AGAINST NATURE.

This may be committed either with man or beast; it was made felony without benefit of clergy by the 25 Hen. VIII. c. 6. revised and confirmed by 5 Eliz. c. 27.

KIDNAPPING.

Kidnapping is the forcible abduction or stealing away of a man, woman, or child, from their own country, and sending them into another: this is by the common law punished with fine, imprisonment, and pillory.* And also the 11 & 12 W. III. c. 7. though principally intended against pirates, has a clause that extends to prevent the leaving of such persons abroad, as are thus kidnapped or spirited away, by enacting that if any captain of a merchant vessel, shall (during his being abroad) force any person on shore, or wilfully leave him behind, or refuse to bring home all such men as he carried out, if able and desirous to return, he shall suffer three months imprisonment.

* See p. 177, Note.

ARSON.

Arson is the wilful and malicious burning of the house or out-house of another man. Not only the bare dwelling-house, but all the out-houses that are parcel thereof, though not contiguous thereto, nor under the same roof, as barns and stables, may be the subject of arson.

Arson may be committed by wilfully setting fire to one's own house, provided one's neighbour's house is thereby also burnt; but if no mischief be done but to one's own, it does not amount to felony, though the fire were kindled with intent to burn another's. For, by the common law, no intention to commit felony amounts to the same crime; though it does, in some cases, by particular statutes. However, such wilful firing one's own house, *in a town*, is a high misdemeanor, and punishable by fine, imprisonment, and perpetual sureties for good behaviour.

If a landlord or reversioner set fire to his own house, of which another is in possession under a lease from himself, or from those whose estates he hath, it shall be accounted arson; for, during the lease, the house is the property of the tenant.

As to what shall be said to be a *burning*, so as to amount to arson, a bare intent, or attempt to do it, by actually setting fire to a house, unless it absolutely *burn*, does not fall within the description. But the burning and consuming of any part is sufficient, though the fire be afterwards extinguished. Also it must be a *malicious* burning, otherwise it is only a trespass; and therefore no negligence or mischance amounts to it. But, by the 6 Ann. c. 31. any servant negligently setting fire to a house or out-houses, shall forfeit 100*l.* or be sent to the house of correction for eighteen months.

The punishment of arson, like other capital felonies, is death without benefit of clergy.

BURGLARY.

A burglar, according to Sir Edward Coke, is he "that, by night, breaketh and entereth into a mansion-house, with intent to commit a felony." In this definition, we are to consider the *time*, the *place*, the *manner*, and the *intent*.

The *time* must be by night, and not by day; for in the day-time there is no burglary. As to what is reckoned night, and what day, for this purpose, the opinion seems to be, that if there be daylight or *crepusculum* enough begun or left, to discern a man's face withal, it is no burglary. But this does not extend to moonlight, for then many midnight burglaries would go unpunished.

As to the *place*; it must be a *mansion-house*. But it does not seem absolutely necessary that it should in all cases be a mansion-house, for it may also be committed by breaking the gates or walls of a *town* in the night. And therefore we may safely conclude, that the requisite of its being a mansion-house is only in the burglary of a private house, which is the most frequent, and which

is indispensably necessary to form its guilt, that it must be in a mansion, or dwelling-house; for no distant barn or warehouse, or the like, are under the same privileges, nor looked upon as a man's castle of defence; nor is a breaking open of houses wherein no man resides, and which therefore for the time being are not mansion-houses, attended with the same circumstances of midnight terror.

A house, however, wherein a man sometimes resides, and which the owner hath only left for a short season, is the object of burglary, though no one be in it at the time of the fact committed. And if the barn, stable, or warehouse, be parcel of the mansion-house, and within the common fence, though not under the same roof or contiguous, a burglary may be committed therein; for the capital house protects and privileges all its branches and appurtenances, if within the cartilage, or home-stall. But where an out-house was separated from the dwelling-house by an open passage, eight feet wide, but not connected with the dwelling-house by any fence inclosing both; it has been held not to be part of the dwelling-house, and that no burglary could be committed therein.

A chamber in a college or an inn of court, where each inhabitant hath a distinct property, is, to all other purposes as well as this, the mansion-house of the owner. So also is a room or lodging in any private house the mansion for the time being of the lodger, if the owner do not himself dwell in the house, or if he and the lodger enter by different outward doors.

But if the owner himself live in the house, and have but one outward door at which he and the lodgers enter, such lodgers seem only to be inmates, and all their apartments to be parcel of the one dwelling-house of the owner.

Thus, too, the house of a corporation, inhabited in separate apartments by the officers of the body corporate, is a mansion-house of the corporation, and not of the respective officers. But if I hire a shop, parcel of another man's house, and work or trade in it, but never lie there, it is no dwelling-house, nor can burglary be committed therein; for by the lease it is severed from the rest of the house, and therefore it is not the dwelling-house of him who occupies the other part; neither can I be said to dwell therein when I never lie there.

Neither can burglary be committed in a tent or booth erected in a market or fair, though the owner may lodge therein; for the law regards nothing but permanent edifices; a house, or church, the wall or gate of a town.

As to the *manner* of committing burglary, there must be both a breaking and entry to complete it. But they need not be both done at once; for if a hole be broken one night, and the same breakers enter the next night through the same, they are burglars. There must in general be an actual breaking; at least by breaking or taking out the glass of, or otherwise opening, a window; picking a lock, or opening it with a key; nay, by lifting up the latch of a door, or unloosing any other fastening which the owner has provided.

But if a person leave his doors and windows open, it is his own

folly and negligence, and if a man enter therein, it is no burglary; yet if he afterwards unlock an inner or chamber door, it is so. But to come down a chimney is held a burglarious entry. So also to knock at the door, and upon opening it, rush in with a felonious intent; or, under pretence of taking lodgings, to fall upon the landlord and rob him; or to procure a constable to gain admittance in order to search for traitors, and then to bind the constable, and rob the house; all these entries have been adjudged burglarious, though there was no actual breaking.

If a servant open and enter his master's chamber-door, with a felonious design, or if any other person lodging in the same house, or in a public inn, open and enter another's door with such evil intent, it is burglary.

If a servant conspire with a robber, and let him into the house by night, this is burglary in both.

As for the entry, any the least degree of it, with any part of the body, or with an instrument held in the hand, is sufficient; as to step over the threshold, to put a hand or a hook in at a window to draw out goods, or a pistol to demand one's money, are all of them burglarious entries. The entry may be before the breaking as well as after; for by the 12 Ann. c. 7. if a person enter into the dwelling-house of another, without breaking in, either by day or by night, with intent to commit felony, or being in such house shall commit any felony, and shall in the night break out of the same, this is declared to be burglary.

As to the *intent*; it is clear that such breaking and entry must be with a felonious intent, otherwise it is only a trespass. And it is the same, whether such intention be actually carried into execution, or only demonstrated by some attempt or overt act, of which the jury is to judge. And therefore such a breach and entry of a house as has been before described, by night, with intent to commit a robbery, a murder, a rape, or any other felony, is burglary, whether the thing be actually perpetrated or not.

Thus much for the nature of burglary; which was felony at common law, but within the benefit of clergy. The statutes, however, of 1 Edw. VI. c. 12. and 18 Eliz. c. 7. take away clergy from the principals, and that of 3 & 4 W. & M. c. 9. from all abettors and accessaries before the fact.

CHAPTER XIII.

Of Larceny.

LARCENY is either simple or mixed.

Simple larceny, is also distinguished into grand and petit. *Grand larceny* is where the goods amount to more than the value of twelve-pence, and are not taken violently from the person of the owner,

nor out of his house. *Petit larceny* is where the goods so taken are of, or under, the value of twelve-pence.

Mixed or compound larceny is the felonious taking of the goods of another, either from his person or his house, and includes the crimes of robbery and housebreaking.

By the 3 Geo. IV. c. 38. § 3. if any person, who shall counsel, hire, procure, or command any other person or persons to commit any larceny whatsoever of the degree of grand larceny, shall be convicted of felony, and entitled to the benefit of clergy, and by the laws now in force shall be liable to be fined and imprisoned for not exceeding one year only, such offender, instead of being so fined and imprisoned, may, at the discretion of the court, be adjudged to be transported for seven years, or to be imprisoned only, or to be imprisoned and kept to hard labour in the common gaol, house of correction, or penitentiary house, for not exceeding three years.

And for the due punishment of accessaries before the fact in cases where the principal offenders shall not have been discovered, or shall be concealed, or not be amenable to justice, it is enacted, that if any person shall counsel, hire, procure, or command any other person or persons to commit any burglary, robbery, or larceny whatsoever, of the degree of grand larceny, and the person or persons actually committing such felony shall not have been convicted thereof, such accessary may be prosecuted for a misdemeanor, and shall be liable to be imprisoned, or to be imprisoned and kept to hard labour, in the common gaol, house of correction, or penitentiary house, for not exceeding two years. although the principal felon or felons be concealed, or be conveyed away, or be not before convicted of any such felony, and whether he, she, or they, is or are amenable to justice or not: but such offender, after having been prosecuted and convicted under this act, shall not for the same offence be afterwards liable to be punished as an accessary before the fact, if the principal felon or felons shall be afterwards convicted. § 4.

SIMPLE LARCENY.

Simple larceny is the felonious taking and carrying away the personal goods of another.

Every larceny must include a trespass; and if the party be guilty of no trespass, he cannot be guilty of felony in carrying the goods away. Thus, if a person find goods, and convert them *animo furandi* to his own use, or obtain the actual delivery of them from the owner for a special purpose, as a carrier to convey them to a certain place, or a tailor to make them into clothes, and afterwards convert them, yet neither the finder, the carrier, nor the tailor can be guilty of larceny: but if the goods were not lost, or the carrier or tailor pretended to convey them, or to make them up, with a dishonest and fraudulent intent to carry them feloniously away, in such case the law will consider them, notwithstanding the delivery, as constructively remaining in possession of the owner;

and being taken from his possession, the parties carrying them away will be guilty of larceny.

To constitute larceny, the property must be taken from the possession of the owner; and therefore where a man intending to go a journey hires a horse fairly and *bonâ fide* for that purpose, and evidences the truth of such intention by actually proceeding on his way, and afterwards rides off with the horse, it is no theft, because the felonious design was hatched subsequent to the delivery; and the delivery having been obtained without fraud or design, the owner parted with his possession as well as his property, and therefore gave the hirer complete dominion over the horse, upon trust that he would return him when the journey was performed.

And it is now fully established, that in all cases where horses or carriages are hired and never returned, if the jury be of opinion, from the circumstances, that the person to whom they are delivered intended at the time of the hiring never to restore them, or that the intention to convert them to their own use existed in their minds at the time they gained possession, they are guilty of felony. And where a person hires a horse for a particular time, or to go a specific journey, and, after complying with the terms of the special agreement, sells it, his possession being then unsupported by any privity of contract or consent of the owner, he is held to be guilty of felony.

A person who has the bare charge or special use of goods, but not the possession, as a shepherd who looks after sheep, or a butler who takes care of plate, may be guilty of felony in taking them away. And, in general, if the possession of property be obtained by any contrivance *animo furandi*, as by pretending to find a valuable ring, cutting cards, or laying wagers, or by undertaking to change a note into cash, or gold into silver, it amounts to felony.

But where the sale of a horse or any other article is complete, and possession is given to the buyer, who rides away with the horse, or carries off the article without paying for it, no felony is committed. For the property as well as the possession is in that case parted with, and the owner is defrauded, not of the horse or article, but only of its price, and he has his remedy by an action to recover it.

There must not only be a taking or converting, but a carrying away is necessary to constitute larceny. A bare removal from the place in which the goods are taken, although the thief do not quite make off with them, is a sufficient asportation or carrying away. As, if a man be leading another's horse out of a close, and be apprehended in the fact; or if a guest stealing goods out of an inn, have removed them from his chamber down stairs; these have been adjudged sufficient carrying away to constitute larceny.

Or, if a thief, intending to steal plate, take it out of the chest in which it was, and lay it down upon the floor, but is surprised before he can make his escape, this is larceny. So where a man snatched an ear-ring from a lady's ear, and afterwards dropped it in her hair, it was held a sufficient asportation to constitute a robbery,

The goods taken must be personal goods of some intrinsic value; for larceny cannot be committed of things fixed to the freehold, or savouring of the realty, as corn, grass, trees, and the like. But if the thief sever them at one time, whereby they are converted into personal chattels in the constructive possession of him on whose soil they are left or laid, and come again at another time when they are so turned into personalty, and take them away, it is larceny; and so it is, if the owner or any one else have severed them.

By 21 Hen. VIII. c. 7. if any servant to whom any goods have been entrusted by his master or mistress, shall go away with the same, with an intent to steal them, or shall embezzle any property during his service, to the value of forty shillings, he shall be guilty of felony, except apprentices and servants under eighteen years old.

By the 3 Geo. IV. c. 38. § 2. if any clerk, apprentice, or servant whatsoever, shall feloniously steal any goods, chattels, money, bond, bank note, cheque upon a banker, draft, promissory note for the payment of money, bill of exchange, or other valuable security or effects, from or belonging to, or in the possession, custody, or power of his or her master or mistress, or employer, and shall be lawfully convicted thereof, and be entitled to the benefit of clergy, then and in every such case, such offender, instead of being subjected to such punishment as may now by law be inflicted upon persons so convicted, and entitled to the benefit of clergy, may, at the discretion of the court by or before which he or she shall be convicted, be ordered and adjudged to be transported beyond the seas for any term not exceeding fourteen years, or to be imprisoned only, or to be imprisoned and kept to hard labour, in the common gaol, house of correction, or penitentiary house, for any term not exceeding three years.

By the 30 Geo. III. c. 85. if any servant or clerk shall, by virtue of his employment, receive any money, bills, or any valuable security, goods, or effects, in the name or on the account of his master or employer, and shall afterwards embezzle any part of the same, he shall be deemed to have feloniously stolen the same, and be subject to transportation for any term not exceeding fourteen years.

By the 52 Geo. III. c. 63. if any person or persons with whom (as banker, merchant, broker, attorney, or agent of any description whatsoever) any ordnance debenture, exchequer bill, navy, victualling, or transport bill, or other bill, warrant, or order for the payment of money, state-lottery ticket, or certificate, seaman's ticket, Bank receipt for payment of any loan, India bond, or other bond, or any deed, note, or other security for money, or for any share or interest in any national stock or fund of this or any other country, or in the stock or fund of any corporation, company, or society established by act of parliament or royal charter, or any power of attorney for the sale or transfer of any such stock or fund, or any share or interest therein, or any plate, jewels, or other personal effects, shall have been deposited in trust, shall embezzle the same, every person so offending is deemed guilty of

a misdemeanor, and liable to transportation for fourteen years, or to such other punishment as may be inflicted on persons guilty of misdemeanor. § 1.

And by section 2. if any banker, merchant, broker, attorney, or other agent, in whose hands any sum or sums of money, bill, note, draft, cheque, or order for the payment of any sum or sums of money shall be placed, with any order or orders in writing, and signed by the party or parties who shall so deposit or place the same, to invest such sum or sums of money, or the money to which such bill, note, draft, cheque, or order as aforesaid, shall relate, in the purchase of any stock or fund, or in or upon government or other securities, or in any other way or for any other purpose specified in such order or orders, shall in any manner apply to his or their own use and benefit any such sum or sums of money aforesaid, shall be liable to the same punishment.

The act is not to prevent persons receiving money due on securities; nor to extend to any partners not being privy to the offence; nor to lessen any remedy at law or equity, that the party aggrieved may have; neither is it to affect trustees or mortgagees; nor to restrain bankers or others from disposing of securities on which they have a lien.

By the 15 Geo. II. c. 13. officers or servants of the Bank of England, secreting or embezzling any note, bill, warrant, bond, deed, security, money, or effects, entrusted with them, or with the company, are guilty of death without benefit of clergy.

By 5 Geo. III. c. 25. and 7 Geo. III. c. 50. if any deputy, clerk, agent, letter-carrier, post-boy, or rider, or any other officer or person whatsoever, employed in the Post-Office, shall secrete, embezzle, or destroy any letter, packet, or bag of letters, which he shall be entrusted with, containing any bank note, bank post-bill, bill of exchange, exchequer bill, &c. or any security whatever for the payment of money, or shall steal and take the same out of any letter or packet that shall come to his possession, he shall suffer death without benefit of clergy. Or, if he shall destroy any letter or packet with which he has received money for the postage, or shall advance the rate of postage on any letter or packet sent by the post, and shall secrete the money received by such advancement, he shall be guilty of single felony.

By the 3 & 4 W. & M. c. 9. if any person shall take away, with intent to steal, embezzle, or purloin, any chattel, bedding, or furniture, which, by contract or agreement, he was to use, or shall be let to him in or with such lodgings, he shall be guilty of felony.

By the 2 Geo. II. c. 25. whosoever shall steal, or take by robbery, any exchequer orders or tallies, or other orders entitling any other person to any annuity or share in any parliamentary fund, or any Exchequer bills, Bank notes, South-Sea bonds, East-India bonds, or any other company, society, or corporation bills of exchange, navy bills, or debentures, goldsmiths' notes for the payment of money, or other bonds or warrants, bills or promissory notes for the payment of any money, being the property of any other per-

son, or of any corporation, shall be deemed guilty of felony of the same nature and in the same degree, and with or without the benefit of clergy, in the same manner as it would have been if the offender had stolen the money they were meant to secure.

By the 3 Geo. IV. c. 24. all persons who shall receive or buy any Exchequer order or tally, or other order, entitling any other person or persons to any annuity or share in any parliamentary fund, or any Exchequer bill, Bank note, South-Sea bond, East-India bond, dividend warrant of the Bank of England, South-Sea Company, East-India Company, or any other company, society, or corporation bill of exchange, navy bill or debenture, goldsmith's note for the payment of money, or other bond, order, or warrant, bill or promissory note for payment of money, knowing the same to have been stolen, shall be liable to be prosecuted and punished respectively for felony or misdemeanor, as the case may be, in like manner as persons receiving or buying stolen goods and chattels, knowing the same to have been stolen, are by the laws now in force liable to be prosecuted and punished. § 1.

And all powers, provisions, and enactments, contained in the several acts now in force, relative to the searching for and discovery of stolen goods and chattels, and to the apprehending, prosecuting, and punishing of persons receiving or buying stolen goods or chattels, knowing the same to have been stolen, shall extend to the searching for and discovery of any such stolen order, tally, bill, bond, warrant, debenture, or note, and to the apprehending, prosecuting, and punishing of persons receiving or buying the same, knowing them to have been stolen. § 2.

By 5 Geo. III. c. 25. and 7 Geo. III. c. 50. whoever shall rob any mail in which letters are sent or conveyed by the post, of any letter, packet, or bag of letters, or shall steal or take from any such mail, or from any bag of letters sent or conveyed by the post, or from or out of any post office, or house or place for the receipt or delivery of letters or packets sent or to be sent by the post, any letter or packet, shall be deemed guilty of felony, and suffer death without benefit of clergy.

By 12 Ann. c. 18. justices, on information that any ship is in distress, are authorized and required to summon and employ revenue officers and others for the preservation of the cargo; and if any person shall make a hole in such ship, or steal her pumps, it is felony without benefit of clergy.

And, by the 26 Geo. II. c. 19. to plunder, steal, take away, or destroy any shipwrecked goods, that are there, or to beat or wound any person endeavouring to save his life from the wreck, or to hold out false lights, so as to bring any ship into danger, is felony without benefit of clergy. But if the goods stolen be of small value, and no barbarity is used in taking them, the offender may be prosecuted for petit larceny.

By 10 Geo. III. c. 18. if any person shall steal any dog or dogs of any kind or sort whatsoever from the owner thereof, or from any person entrusted by the owner therewith, or shall knowingly buy,

sell, receive, harbour, keep, or detain any such dog or dogs, on conviction by one witness, or on confession before two justices, they shall forfeit for the first offence not exceeding 30*l.* nor less than 20*l.* together with the charges previous to and attending such conviction; on default, to be committed to the house of correction for not more than twelve nor less than six months, unless the penalty be sooner paid; for the second offence, not exceeding 50*l.* nor less than 30*l.* and from twelve to eighteen months imprisonment, and to be publicly whipped within three days after commitment.

By 14 Geo. II. c. 6. and 15 Geo. II. c. 84. if any person shall feloniously drive away, or steal, or shall wilfully kill, any ox, bull, cow, steer, bullock, heifer, calf, sheep, or lamb, with a felonious intent to steal the whole carcase, or any part thereof, or shall assist in committing any such offence, he shall be guilty of felony without benefit of clergy.

By 1 Edw. VI. c. 12. and 2 & 3 Edw. VI. c. 33. to take or steal any horse, gelding, or mare, is felony without benefit of clergy. And by 31 Eliz. c. 12. § 5. not only all accessaries before the fact, but all accessaries after the fact, shall be deemed guilty of felony, without benefit of clergy.

At the time this statute was passed, an accessary was only guilty for receiving the felon, not for receiving the goods. But now, by 3 & 4 W. & M. c. 9. those who receive stolen horses are in the description of receivers of stolen goods, and liable to be transported for fourteen years.

By 6 Geo. III. c. 48. whoever shall in the night-time steal, damage, or destroy any oak, beech, walnut, ash, elm, cedar, fir, asp, lime, sycamore, and birch, or the lops and tops thereof, and by 13 Geo. III. c. 33. poplar, alder, larch, maple, and hornbeam, or any tree likely to become timber, without the consent of the owner (or in any of his majesty's forests or chases, without the consent of the surveyor, or his deputy, or persons entrusted with the care thereof), shall for the first offence forfeit not exceeding 20*l.* with the charges previous to and attending such conviction, or, in default thereof, be imprisoned for a term not exceeding twelve nor less than six months, unless the penalty and charges be before paid; for the second offence, to forfeit not exceeding 30*l.* with the charges as aforesaid, or be imprisoned from twelve to eighteen months; and for a third offence, the offender to be deemed guilty of felony, and be transported for seven years.

By the 6 Geo. III. if any person shall in the night-time go into the woods or wood-grounds of any of his majesty's subjects, and cut, spoil, or otherwise destroy any kind of wood, or carry or convey the same away, (or shall, by night or day, cut down, destroy, take, or convey away any hollies, thorns, or quicksets, growing in any of his majesty's forests or chases, or within the woods or wood-grounds of any of his majesty's subjects, 9 Geo. III. c. 41.) or shall have in his custody any kind of wood or young trees (or any such hollies, thorns, or quicksets, as are specified

in the 9 Geo. III. c. 41.) and shall not give a satisfactory account how he came by the same; he shall, on conviction, forfeit for the first offence not exceeding 40s. with the charges previous to and attending the conviction, or on default thereof be committed to the house of correction for one month to hard labour, and be once whipped there; for the second offence he shall forfeit 5*l.* with the charges as aforesaid, or be imprisoned for three months, and be whipped once in every of the said months; and for the third offence, be imprisoned for any time not exceeding two years nor less than six months, to be kept to hard labour, and whipped in such a manner, and at such times and places, as the justices at the sessions shall think fit.

By 29 Geo. II. c. 36. any person who shall unlawfully cut, take, destroy, break, throw down, bark, pluck up, burn, deface, spoil, or carry away any tree, growing in any waste, wood, or pasture, in which any person has a right of common, shall incur the like penalty as by the 6 Geo. I. st. 2. c. 48.

And the 45 Geo. III. c. 68. enacts, that if any person, without legal right and authority, shall carry away any bark from any wood or wood-grounds, or shall have any bark in his possession, and shall not give a satisfactory account of it, for the first offence he may be fined 40s. for the second 5*l.* with costs, and for the third he may be punished as an incorrigible rogue.

To prevent the destruction of woods in forests, it is provided by the 5 Geo. III. c. 31. that every surveyor of his majesty's woods, and his lawful deputy, and the officers and keepers of any forest or chase, may seize and take away for his own use any axe, or other instrument, used by any person whom they shall find unlawfully cutting down or destroying any timber or other tree, underwood, or covert, within such chase or forest.

And by 15 Car. II. c. 2. any constable may apprehend, or cause to be apprehended, every person he shall suspect having or carrying any burden of any kind of wood, underwood, poles, young trees, bark, bast of any trees, or any gates, stiles, posts, pales, rails, or hedge-wood, broom, or furze; and, by warrant of one justice, he may enter into and search the houses, or other places belonging to the houses, of every person he shall suspect to have any kind of wood; and unless such person shall give a good account how they came by the same, or produce the party of whom they bought the same, or some credible witness to depose upon oath such sale thereof, they shall for the first offence give the owner such recompence for damages, and within such time, as the justice shall appoint, and shall also pay to the poor a sum not exceeding 10s. or in default be committed to the house of correction for any time not exceeding one month, or be whipped by the constable; for the second offence, be sent to the house of correction for one month, there to be kept to hard labour; and for a third offence, be deemed an incorrigible rogue: provided, that in all cases they are questioned within six weeks after the offence committed.

By 15 Car. II. c. 2. whoever shall buy any burdens of wood, &c. which may justly be suspected to have been stolen, one justice,

on complaint within six weeks, may examine the matter upon oath, and award the purchaser thereof to pay treble value to him from whom it was unlawfully taken; or, in default thereof, may commit the party to gaol, there to remain one month without bail.

If any person by day or night, cut, take, destroy, break, throw down, bark, pluck up, burn, deface, spoil, or carry away any woodsprings, pales, woods, tops of trees, underwoods, or coppice woods, thorns, or quicksets, without the consent of the owners thereof; or shall break open, throw down, level, or destroy any hedges, fences, dykes, or other inclosures thereof; if the offender be not known, the owner may have such recompence from the inhabitants of the parishes, towns, hamlets, villages, or places, joining on such wood-springs or wood-grounds, and recover such damages, and in the same manner and form, as by the 13 Edw. I. st. 1. c. 46. unless the offender be convicted by such parishes or places within six months: but if the offender be known, he shall be committed to the house of correction to hard labour for three months, and where there is no house of correction, to the prison for four months, to be publicly whipped once a month during the time. 1 Geo. I. st. 2. c. 18; 6 Geo. I. c. 6.

By 6 Geo. III. c. 36. if any person shall in the night-time steal, damage, or destroy any root, shrub, or plant, of the value of five shillings, growing in any garden ground, nursery ground, or other inclosed ground, or shall be aiding or assisting therein; or shall buy or receive such root, shrub, or plant, knowing the same to be stolen; he shall be guilty of felony, and transported for seven years.

And by 6 Geo. III. c. 48. whosoever shall steal, damage, or destroy any root, shrub, or plant, in any field, nursery, garden, or garden grounds, shall forfeit for the first offence not exceeding forty shillings, and for the second not exceeding five pounds.

A doubt having arisen whether this statute did not virtually repeal the 6 Geo. III. c. 36. on a case reserved, the twelve judges were of opinion that it was repealed, but to be considered *in pari materia*, and when taken together that these provisions will stand thus: if the property be of the value of five shillings, and be taken in the night, it is felony; if under five shillings, and taken either by night or day, it is a misdemeanor; if above five shillings, and under forty shillings, if taken in the day, a misdemeanor.

By the 13 Geo. III. c. 32. if any person shall steal and take away, or maliciously pull up and destroy, any turnips, potatoes, cabbages, parsnips, peas, or carrots, growing or being in any garden, lands, or grounds, he shall, on conviction within thirty days, forfeit over and above the value of the goods stolen, a sum not exceeding ten shillings to the use of the poor; first making the owner satisfaction; and on default of payment, to be committed to the house of correction, there to be kept to hard labour for any time not exceeding one month, unless the penalty shall be sooner paid. And by 31 Geo. II. c. 35. the same punishment is inflicted for the stealing of madder roots.

And by the act of the 42 Geo. III. it is enacted, that if any person shall be convicted of having committed the offences re-

cited in the above act (13 Geo. III.) in any garden, orchard, land or ground, open or inclosed, he shall forfeit a sum not exceeding 20*s.* besides the value of the goods.

By 43 Eliz. c. 7. to rob any orchards or gardens, or to dig or pull up any fruit trees, or destroy any hedges, pales, rails, or fences therein growing or placed, with intent to take the same away, (the same not being felony by the laws of this realm), incurs a compensation for the damage done, and, on default of payment; the corporal punishment of whipping.

By 25 Geo. II. c. 10. whoever shall unlawfully break, or by force enter into any mine, pit, shaft, or vein of wad, black cauke, or black lead, with an intent to carry away from thence any wad, black cauke, or black lead; or shall unlawfully from thence take and carry away any wad, black cauke, or black lead, although such mine, &c. be not actually broke, or by force entered into, by such offender; or shall aid, abet, assist, hire, or command any person or persons to commit such offences as aforesaid; such offenders shall be guilty of felony, and may be committed to the county gaol or house of correction, for any time not exceeding a year, and publicly whipped; or transported for a term not exceeding seven years.

By the 4 Geo. II. c. 32. to steal, cut, rip, or break, with intent to steal, any lead or iron bar, iron grate, iron palisadoes, or iron rail whatsoever, being fixed to any dwelling-house, out-house, coach-house, stable, or other building used or occupied with such dwelling-house, or thereunto belonging, or to any building whatsoever, or fixed in any garden, orchard, court-yard, fence, or outlet, belonging to any dwelling-house or other building; their aiders, abettors, and assisters; or whosoever shall knowingly buy or receive the same; shall be guilty of felony, and may be transported for seven years.

And by the 21 Geo. III. c. 68. whoever shall slip, cut, break, or remove, with intent to steal, any copper, brass, or bell-metal utensil or fixture, being fixed to any dwelling-house, out-house, coach-house, stable, or other building, used or occupied with such dwelling-house, or thereunto belonging, or to any other building whatsoever, or fixed in any garden, orchard, court-yard, fence, or outlet, belonging to any dwelling-house or other building, or any iron rails or fencing set up or fixed in any square, court, or other place, (such person having no title or claim of title thereto); or whoever shall be aiding, abetting, or assisting therein, or shall knowingly buy or receive the same, although the principal felon had not been convicted of stealing the same, shall be guilty of felony, and may be transported for seven years, or imprisoned for any time not exceeding three years nor less than one, and there kept to hard labour, and within that time be once or oftener but not more than three times publicly whipped.

By the 5 Eliz. c. 21. it is provided, that if any person shall unlawfully break down or destroy any head or dam of a fish-pond, or shall wrongfully fish therein, with intent to take or kill fish, he shall, on conviction, be imprisoned three months, pay treble da-

mages to the party grieved, and find sureties for good behaviour for seven years.

By the 22 & 23 Car. II. c. 25. to fish in a private or several fishery, whether with nets or lines, or to take any fish by any means whatsoever, in any river, stew, pond, moat, or other water, or to be aiding therewith without the owner's consent, the offender, on conviction within one month after the offence committed, shall give to the party injured a sum not exceeding treble damages, and moreover forfeit to the use of the poor a sum not exceeding 40s. or, on default thereof, be imprisoned for a term not exceeding one month, unless he enter into a bond with surety in a sum not exceeding 10*l.* never to offend in like manner.

By the 4 & 5 W. III. c. 23. none but the owners and occupiers of fisheries, the makers and sellers of nets, authorized fishermen, and their apprentices, shall keep nets or other engines for taking of fish, on pain of seizure.

By 9 Geo. I. c. 23. if any person, armed and disguised, shall unlawfully steal or take away any fish out of any river or pond; or, whether armed or disguised or not, shall unlawfully and maliciously break down the head or mound of any fish-pond, whereby the fish shall be lost or destroyed, or shall rescue any person in custody for any such offence, or procure any other to join him therein, he shall be guilty of felony without benefit of clergy. But now, by 4 Geo. IV. c. 54. the offence is punishable by transportation for seven years, or imprisonment and hard labour in the house of correction for any term not exceeding three years.

And by the 5 Geo. III. c. 14. to enter, without the consent of the owner, into any park or paddock inclosed, or into any garden, orchard, or yard, belonging to or adjoining any dwelling-house, in or through which park, paddock, garden, orchard, and yard, any river, stream, pond, pool, moat, stew, or other water, shall run or be, and by any means whatsoever to steal, kill, or destroy any fish, bred, kept, or preserved therein; or to be assisting therein; or to receive or buy any such fish; is transportation for seven years, provided the offenders be indicted within six months after the offence committed. And by the third section, to take, kill, or destroy, or attempt to take, kill, or destroy, any fish in any rivers, &c. in any inclosed private ground, not being a park, &c. belonging to or adjoining to a dwelling house, incurs a penalty of 5*l.* and on default thereof to be committed to the house of correction for a term not exceeding six months.

By 22 Car. II. c. 5. to cut or steal any cloth or woollen manufactures from the rack or tenter in the night-time, was felony without benefit of clergy. But, by 4 Geo. IV. c. 63. the punishment is altered to transportation for life or not less than seven years, or imprisonment, or imprisonment and hard labour, for not exceeding seven years.

By the 18 Geo. II. c. 27. to steal, by day or night, any linen, fustians, calico, cotton, cloth made of cotton or linen yarn mixed, or any thread, linen, or cotton yarn, linen or cotton tape, icke, filleting, laces, or any goods whatsoever, exposed to be printed

bleached, bowked, or dried, in any printing or bleaching-ground, or in any of the shops, lofts, or places thereto belonging, to the value of 10s. or to assist in so doing, is felony without benefit of clergy; but the judge has a discretionary power to transport for fourteen years.

By 23 Hen. VIII. c. 1. and 25 Hen. VIII. c. 3. to steal, carry, or take away any goods or chattels from any church, chapel, or other holy place, is felony without benefit of clergy.

But it having been held not to be sacrilege within these statutes, when not accompanied with the actual breaking of the church or chapel from which the goods are stolen, it was enacted by the 1 Edw. VI. c. 22. that to steal goods out of any parish church, or other church or chapel, is, whether accompanied with a breaking or not, felony without benefit of clergy.

MIXED OR COMPOUND LARCENY

Consists in a taking from one's house or person.

Larceny from the person is either by privately stealing, or by open and violent assault, which is usually called robbery.

Privately stealing from the person.—By 8 Eliz. c. 4. the felonious taking of any money, goods, or chattels, above the value of twelve-pence, from the person of any other, privily without his knowledge, in any place, is felony without benefit of clergy. But by the 48 Geo. III. c. 120. the punishment is altered to transportation for life, or for seven years, or to be imprisoned only; or to be imprisoned and kept to hard labour, for any term not exceeding three years.

It has been held, that this statute does not protect persons who by intoxication have exposed themselves to depredation; unless the person upon whom the larceny was committed was made drunk by the artifice of the prisoner, in order to accomplish his purpose.

But an offender who steals any thing privily from the person of another while such person is deprived of consciousness by the power of sleep, is guilty of the capital part of the offence.

Robbery of the person.—Robbery is the forcible and felonious taking from the person of another goods or money to any value, by violence or putting him in fear; this by the 8 Eliz. c. 4. is felony without benefit of clergy.

To constitute this offence, there must be a *forcible* taking, otherwise it is no robbery; but any, the least degree of force, which may inspire the mind with fear, is sufficient; and therefore where a person kept fast hold of a basket on his head until it was wrenched from him by the thief, or to snatch an ear-ring from a lady's ear, have been held robbery; neither can he who has once actually completed the offence, by forcibly taking goods into his possession, afterwards purge it by any re-delivery.

It is immaterial of what value the thing taken is: a penny as well as a pound, thus forcibly extorted, makes a robbery.

It must be a taking from the *person*, as a horse whereon a man is riding, or money out of his pocket; or else openly and before his face.

year after the robbery committed. And by 8 Geo. II. c. 16. the party robbed must enter into a bond in the sum of 100*l.* with two sufficient sureties for payment of costs, in case he shall happen to be nonsuited or shall discontinue the action, or in case judgment shall be given in demurrer, or a verdict against him.

By the 58 Geo. III. c. 70. which repeals several of the laws granting rewards for the apprehension of felons, it is enacted, that so much of the act 4 W. & M. c. 8. as authorizes the payment of 40*l.* by way of reward to every person who shall apprehend or prosecute to conviction one or more thieves or robbers, for any robbery committed upon any highway, passage, field, or open place; and also so much of the act 6 & 7 W. III. c. 17. as authorizes and directs the payment of 40*l.* by way of reward to every person who shall apprehend any person who shall have counterfeited any of the current coin of this realm, or that shall have clipped, washed, filed, or any way diminished the same, or shall bring or cause to be brought into this kingdom, any clipt, false, or counterfeit coin, and prosecute such person until convicted; and also so much of the act 5 Ann. c. 31. as authorizes and directs the payment of 40*l.* by way of reward to every person who shall apprehend any person guilty of burglary, and prosecute him until convicted; and also so much of 14 Geo. II. c. 6. as authorizes and directs the payment of 10*l.* by way of reward to every person who shall apprehend and prosecute to conviction any offender who shall steal one or more sheep, or shall assist any person to commit any such offence; and also so much of the act 15 Geo. II. c. 18. as authorizes and directs the payment of 40*l.* by way of reward to whoever shall apprehend any person who shall have committed any of the offences by the same act made high treason or felony, and the payment of the sum of 10*l.* by way of reward to whoever shall in like manner apprehend any person who shall have made or counterfeited any copper money, and shall prosecute such offenders until convicted; shall be, and the same are hereby repealed. § 1.

And, from and after the passing of this act, no certificate which shall be granted pursuant to the recited act of 10 & 11 W. III. to any person who shall apprehend and prosecute to conviction any person guilty of any of the felonies therein before-mentioned, to discharge such person from parish and ward offices, shall be assignable by the person to whom such certificate shall be originally granted, to any person whosoever; nor shall any such certificate exempt from parish or ward offices any other person whomsoever than the person to whom the same was originally granted. § 2.

But nothing herein contained shall extend to take away from the executors or administrators of any person killed by any robber, endeavouring to apprehend or in making pursuit after him, of any reward to which the executors or administrators would be entitled by the said act of 4 W. & M. c. 8; nor to deprive any person of the horse, furniture, and arms, money, or other goods of any robber, and which by the same statute are directed to become the property of any person who shall apprehend, prosecute, or convict any such robber as therein mentioned. Nor shall any thing herein contained

extend to deprive the executors or administrators of any watchman or other person who shall happen to be killed by any burglar or housebreaker, endeavouring to apprehend or in making pursuit after him, of any reward to which such executors or administrators would be entitled by virtue of the said act, 5 Ann. c. 31.—§ 3.

And as many persons are deterred from prosecuting persons guilty of felony, upon account of the expence and loss of time, it is enacted, that from and after the passing of this act it shall be lawful for the court, at the request of the prosecutor, or any person who shall become bound in any recognizance to prosecute or give evidence, or who shall be subpoena'd to give evidence against any person accused of any grand or petit larceny or other felony, and who shall appear to prosecute and give evidence, or who shall appear to the court to have been active in the apprehension, to order the sheriff or treasurer of the county to pay unto such prosecutor and witnesses, and persons concerned in such apprehension, as well the costs, charges, and expences which such prosecutor shall be put to in preferring the indictment, as also such sums of money as to the court shall seem reasonable and sufficient to reimburse such prosecutor, and witnesses, and persons, for the expences they shall have been put to in attending before the grand jury, and in otherwise carrying on such prosecution, and also to compensate such prosecutor, and witnesses, and persons, for their loss of time and trouble in such apprehension and prosecution. § 4.

Of privately stealing from the House.—By the 10 & 11 W. III. c. 23. it was enacted, that all persons who, by night or day, should, in any shop, warehouse, coach-house, or stable, privately and feloniously steal any goods, wares, or merchandizes, of the value of five shillings or more, or should assist, hire, or command any person to commit such offence, should be guilty of felony without benefit of clergy. But the severity of this punishment having been thought to be the means of deterring persons from prosecuting, it was enacted by the 1 Geo. IV. c. 117. that so much of the said act as took away the benefit of clergy from persons convicted of privately and feloniously stealing any goods, wares, or merchandizes under the value of 15*l.* should be repealed, and the following punishment substituted; which now, by the 4 Geo. IV. c. 53. is extended to all offences of this description, whether the goods stolen be under or above that value. By the last-mentioned statute, “every person convicted of privately stealing any goods or chattels in any shop, warehouse, coach-house, or stable, or of procuring, counselling, aiding, or abetting any such offenders, shall be liable, at the discretion of the court to be transported, beyond the seas for life, or for any time not less than seven years, or to be imprisoned only, or to be imprisoned and kept to hard labour in the common gaol or house of correction, for any time not exceeding seven years.”

The property stolen must be such as is common to, and usually kept in the places mentioned in the act, and not any other valuable thing which may happen to be put there; and therefore it has been held, that only bridles, saddles, and the like, and not the coach-

man's box-coat, or other livery, are the proper furniture of a stable. Shops and warehouses also, when used merely as repositories of goods, and not as places of sale, are not within the act; and consequently a prisoner cannot be convicted of privately stealing in a shop any article which is not exposed there for sale, but which happens to be left there to be repaired, or for some other similar purpose. It has also been solemnly determined, that privately stealing money to the amount of five shillings, is not within this statute.

In prosecutions under this act, it is held not to be privately stealing, if any person whatsoever see or perceive the theft at the time it is committed.

Robbing in a Dwelling-House.—By 23 Hen. VIII. c. 1. and 25 Hen. VIII. c. 3. to rob any person or persons in their dwelling-house or dwelling-place, the owner or dweller, his wife, children, or servants being then within, and put in fear and dread by the same, is felony without benefit of clergy.

By 1 Edw. IV. c. 12. § 10. to break a house burglariously, if in the night-time, or to break a house and commit a felony therein, if in the day-time, any person being then in the same house where the breaking shall be, and thereby put in fear and dread, is felony without benefit of clergy.

There must be an actual breaking of the house, or some part of it, to oust the offender of his clergy by this statute.

By 5 & 6 Edw. VI. c. 1. to rob any person in any part or parcel of his dwelling-house, or in any place within the precincts of the same, the owner, his wife, children, or servants being in the same house or place at the time, whether the owner, his wife, or children shall be sleeping or waking, is felony without benefit of clergy.

These statutes extend to cases where persons are within the house at the time of the robbery; the following where no person is within the house at the time.

By 39 Eliz. c. 15. to take away in the day time any money, goods, or chattels, being of the value of five shillings or upwards, in any dwelling-house or houses, or any part thereof, or any out-house or out-houses belonging to and used with any dwelling-house or houses, is felony without benefit of clergy.

By 5 & 6 Edw. VI. c. 9. to rob any person in any booth or tent, in any fair or market, the owner, his wife, children, servant or servants, then being within the booth or tent, whether they shall at the time be sleeping or waking, is felony without benefit of clergy.

Housebreaking.—By 3 & 4 W. & M. c. 9. to rob any dwelling-house in the day-time, any person being therein, and put in fear, or to comport, aid, abet, assist, counsel, hire, or command any person to commit such offence, is felony without benefit of clergy.

Although this part of the statute does not expressly signify that breaking and entering the house is necessary to constitute the crime, yet as the word *rob*, in a legal construction, alway includes the idea of force and violence, it is held that the ingredients of breaking and entering are, *ex vi termini*, included in, and implied by, the term *rob*; and it is settled in a variety of determinations upon the statutes relating to this subject, that the breaking must be

of a dwelling-house, in the same way as it would be necessary to constitute burglary at common law.

By 3 & 4 W. & M. c. 9. to break into any dwelling-house, shop, or warehouse thereunto belonging, or used therewith, in the day-time, and feloniously to take away any money, goods, or chattels, of the value of five shillings or upwards, therein being, although no person shall be within such dwelling-house, shop, or warehouse; or to comport, aid, abet, assist, counsel, hire, or command any person to commit such offence, is felony without benefit of clergy.

Stealing in a Dwelling-House.—By 12 Ann. c. 7. to steal any money, goods, wares, or merchandizes, of the value of forty shillings or more, being in a dwelling-house, or out-house thereunto belonging, although such house or out-house be not actually broken by such offender, and although the owner of such goods, or any other person, be or be not in such out-house; or to assist or aid any person to commit such offences, is felony without benefit of clergy; but this act does not extend to apprentices under fifteen years of age.

Assaulting with intent to rob.—It being deemed expedient to make better provision for the punishment of persons guilty of offences against the form of the 7 Geo. II. c. 21. and to amend the said act; it is therefore enacted by the 4 Geo. IV. c. 54. § 5. that if any person shall maliciously assault any other person with intent to rob, or shall by menaces or by force maliciously demand money, security for money, goods or chattels, wares or merchandize, of any other person with intent to steal the same; or shall maliciously threaten to accuse any other person of any crime punishable by law with death, transportation, or pillory, or of any infamous crime, with a view or intent to extort or gain money, security for money, goods, or chattels, wares or merchandize; or shall procure, counsel, aid, or abet the commission of the said offences, or of any of them; every person so offending shall be adjudged guilty of felony, and shall be liable, at the discretion of the court, to be transported for life, or for such term, not less than seven years, as the court shall adjudge, or to be imprisoned and kept to hard labour in the common gaol or house of correction for any term not exceeding seven years. § 5.

CHAPTER XIV.

Of Malicious Mischief.

MALICIOUS MISCHIEF, or **DAMAGE**, is a species of injury to private property, which the law considers as a public crime.

By 22 & 23 Car. II. c. 7. if any person shall in the night-time, maliciously, unlawfully, and wilfully, kill or destroy any horses, sheep, or other cattle, he shall be guilty of felony; or if he shall in

the night-time, maliciously, unlawfully, and willingly, maim, wound, or otherwise hurt any horse, sheep, or other cattle, whereby the same shall not be killed or utterly destroyed, he shall forfeit treble damages.

Also by the 9 Geo. I. c. 22. any person who shall unlawfully and maliciously (against the owner or otherwise) kill, maim, or wound any cattle, whether by night or by day, shall be guilty of felony without benefit of clergy. But by the 4 Geo. IV. c. 54. the punishment is altered to transportation for life, or for seven years, or to be imprisoned only, or to be imprisoned and kept to hard labour, for any term not exceeding seven years.

Horses, mares, and colts, are included under the word "cattle," in this act.

By 37 Hen. VIII. c. 6. to cut out, or cause to be cut out, the tongue of any tame beast alive, belonging to another person, incurs treble damages to the party, and a fine of 10*l.* to the king.

By 26 Geo. III. c. 71. no person shall use any place for slaughtering cattle, not to be killed for butcher's meat, without a licence from the quarter sessions, or a certificate from the minister and churchwardens, that the party is a fit person to be licensed; and if such person slaughter any cattle without such licence, or giving notice as the act directs, he shall be guilty of felony. And if he destroy, burn, or rub with lime, or other corrosive matter, the skin or hide of any beast slaughtered by him, he is guilty of a misdemeanor.

By 22 & 23 Car. II. c. 6. if any person shall in the night-time, maliciously, unlawfully, and willingly, destroy any plantations of trees, or throw down any inclosures, he shall forfeit to the party grieved treble damages.

By 9 Geo. I. c. 22. whoever shall cut down, or otherwise destroy any trees planted in any avenue, or growing in any garden, orchard, or plantation, for ornament, shelter, or profit, shall suffer death without benefit of clergy. But now by 4 Geo. IV. c. 54. the offender is liable to be transported for life or for seven years, or to be imprisoned only, or to be imprisoned and kept to hard labour, for any term not exceeding seven years.

And by 1 Geo. I. st. 2. c. 48. if any person shall maliciously set on fire, or burn, or cause to be burnt, any wood, underwood, or coppice, or any part thereof, he shall be guilty of felony.

By 48 Eliz. c. 13. whosoever shall wilfully and of malice burn, or cause to be burnt, or aid, procure, and consent to the burning of any barn, or stack of corn or grain, within any of the counties of Cumberland, Northumberland, Westmoreland, and Durham, shall be guilty of felony without benefit of clergy.

By 9 Geo. I. c. 22. if any person shall set fire to any house, barn, or out-house; or to any hovel, cock, mow, or stack of corn, straw, hay, or wood, &c. he shall be guilty of felony without benefit of clergy.

By 22 & 23 Car. II. maliciously, unlawfully, and willingly, in the night time, to burn, or cause to be burnt or destroyed, any ricks, or stacks of corn, hay, or grain, barns, houses, buildings,

or kilns, is felony; but the offender may make his election to be transported for seven years.

By 11 Geo. II. c. 22. if any person shall maliciously or wilfully pull down or otherwise destroy any store-house or granary, or other place where corn shall be there kept in order to be exported; or shall unlawfully enter such store-house, granary, or other place, and take and carry away any corn, flour, meal, or grain therefrom, or shall throw abroad or spoil the same, or any part thereof; or shall unlawfully enter on board any ship or vessel, and wilfully and maliciously take and carry away, cast out therefrom, or otherwise spoil or damage any meal, flour, wheat, or grain therein, intended for exportation; he shall be guilty of felony, and transported for seven years.

And by 9 Geo. I. c. 22. if any person shall send any letter, without any name subscribed thereto, or signed with a fictitious name, threatening to burn any house, out-house, barn, stack of corn or grain, hay or straw, he shall be guilty of felony without benefit of clergy. But by the 4 Geo. IV. c. 54. the punishment is transportation for life or seven years, or imprisonment, or imprisonment and hard labour, for not exceeding seven years.

By 9 Geo. I. c. 22. wilfully and maliciously to beat, wound, or use any other violence to any person, with intent to deter or hinder him from buying of corn in any market or other place; or unlawfully to stop or seize upon any waggon, cart, or other carriage, or horse, loaded with wheat, flour, meal, malt, or other grain, in the way to or from any city, market-town, or sea-port, and wilfully and maliciously to break, cut, separate, or destroy the same; or any part thereof, or the harness of the horses; or unlawfully to take off, drive away, kill, or wound any of such horses; or unlawfully to beat or wound the drivers, in order to stop the same; or to scatter such wheat, &c. or to take or damage the same, or any part thereof; subjects the offender to imprisonment in the house of correction for any time not exceeding three months nor less than one, and to be once publicly whipped during the time; for the second offence, to be transported for seven years.

By the 3 Geo. IV. c. 71. if any person shall wantonly and cruelly beat, abuse, or ill-treat any horse, mare, gelding, mule, ass, ox, cow, heifer, steer, sheep, or other cattle, he shall forfeit not exceeding 5*l.* nor less than 10*s.* or be committed to the house of correction for not exceeding three months. Prosecutions must be within ten days. In cases of frivolous and vexatious complaints, the party shall pay to the person complained of 20*s.*

By the 43 Eliz. c. 7. every person who shall unlawfully cut or take away any corn or grain growing, shall on conviction, for the first offence, pay such damages as the justice shall appoint, or on default thereof be whipped; and for every other offence he shall in like manner be whipped.

But if the person shall cut it at one time, and come again at another time and take it away, it is felony.

By 10 Geo. II. c. 32. to set fire to a coal-mine is felony without benefit of clergy. And by 9 Geo. III. c. 29. to destroy or damage any engine or machine for drawing coals from coal-mines, or for

drawing water from any mine of coal, lead, tin, copper, or other minerals, or any bridge, waggon-way, or trunk, belonging to the same, is felony and transportation for seven years. The same statute enacts, that if any person shall burn or set fire to any wind saw-mill, or other wind or water-mill, or any of the works thereunto belonging, he shall be guilty of felony without benefit of clergy.

By the 56 Geo. III. c. 125. if any persons unlawfully, riotously, and tumultuously assembled together in disturbance of the public peace, shall unlawfully, and with force, demolish, pull down, destroy, or damage, or begin to demolish, pull down, destroy, or damage, any fire engine or other engine erected for making, sinking, or working collieries, coal mines, or other mines; or any bridge, waggon-way, or trunk erected for conveying coals or other minerals from any colliery, coal-mine, or other mine, to any place, or for shipping the same, or any staith or other erection or building for depositing coals or other minerals, or used in the management of the business of any such colliery, coal mine, or other mine, whether the same engines, bridges, waggon-ways, trunks, staiths, erections, and other buildings or works, shall be finished or only begun to be set up; every such demolishing, pulling down, destroying, and damaging, or beginning to demolish, pull down, destroy, and damage, shall be adjudged felony, without benefit of clergy. § 1.

The persons damnified shall be entitled to recover the value or damage, in such manner as provided by the 1 Geo. I. c. 5. § 2.

And whenever any number of persons shall so unlawfully assemble, the owners or proprietors shall, as soon as conveniently may be after, give notice to one of the nearest magistrates, and to the constable or some one of the resident housekeepers of the place; and no person shall be enabled to recover any damages by this act, unless he shall have given such notice within two days after such damage done by such offenders unto some of the inhabitants near unto the place where such fact shall be committed, and shall within four days after give in his examination upon oath, or the examination upon oath of his servants, before any justice inhabiting within the hundred, or near unto the same, whether he do know the person or persons; and if it be confessed that he do know, then he shall be bound by recognizance to prosecute; also, no person who shall sustain damage, shall be enabled to sue the inhabitants of any hundred, except within one year; and the notice hereby required may be given in Scotland to the sheriff or stuart depute. § 3.

By 1 Ann. st. 2. c. 9. captains and mariners belonging to ships, destroying the same, to the prejudice of the owners, are guilty of felony without benefit of clergy.

By 43 Geo. III. c. 113. it is enacted, that if any person shall cast away, burn, or destroy any ship, or shall counsel or direct the same to be done, with intent to defraud the insurers, he shall be guilty of felony without benefit of clergy.

And by 12 Ann. st. 2. c. 18. making any hole in a ship in distress, or stealing her pumps, or aiding or abetting such offence,

or wilfully doing any thing to the immediate loss of such ship, is felony without benefit of clergy.

By 1 Geo. II. c. 19. and 8 Geo. II. c. 20. to break down, pluck up, level, or destroy any turnpike gate, or any posts, rails, wall, or other fence thereto belonging, or any chain, bar, or fence of any kind whatsoever, set up or erected by act of parliament to prevent passengers passing without paying toll, was felony without benefit of clergy. But by 1 Geo. IV. c. 115. it is made transportation for life or seven years, or imprisonment with hard labour, or imprisonment only, as the court shall think fit.

By 13 Geo. III. c. 84. § 42. to commit any of the offences aforesaid, or to destroy any crane, or machine, or engine, erected on any turnpike road by authority of parliament for weighing carriages, is transportation for seven years.

By 13 Edw. I. c. 46. and 3 & 4 Edw. VI. c. 6. to overthrow a hedge or dyke in the night-time, subjects the offender to treble damages.

And by 9 Geo. III. c. 29. to destroy or damage any fence for dividing or inclosing any common, waste, or other lands or grounds, divided by authority of parliament, is felony.

By 1 Geo. I. c. 19. and 8 Geo. II. c. 20. to pull down, pluck up, level, or destroy any lock, sluice, floodgate, or other works on any river made navigable by authority of parliament, or by night or by day wilfully and maliciously to level or destroy any floodgate, lock, sluice, or other works on any navigable river for preserving the navigation thereof, was felony without benefit of clergy. But by 1 Geo. IV. c. 115. it is transportation for life or seven years, or imprisonment with hard labour, or imprisonment only, as the court may think fit.

By 10 Geo. II. c. 32. unlawfully to remove or carry away any piles, chalk, or other materials, driven into the ground, or used for securing any marsh, or sea walls, or banks, to prevent the lands from being overflowed, incurs a penalty of 20*l.* and on default of payment to be committed to the house of correction, and there to be kept to hard labour for six months.

By 6 Geo. II. c. 37. unlawfully and maliciously to break down the banks of any river, or any sea-bank, whereby the lands are overflowed or damaged, is felony without benefit of clergy. But by the 4 Geo. IV. c. 46. the offender is liable to be transported for life or for seven years, or to be imprisoned only, or to be imprisoned and kept to hard labour, for not exceeding seven years.

By the 4 Geo. III. c. 12. whoever shall wilfully and maliciously damage or destroy any banks, floodgates, sluices, or other works, or shall open or draw up any floodgate, or do any other wilful hurt or mischief to any navigation erected by authority of parliament, so as to obstruct or hinder the carrying on such navigation, may be transported for seven years.

By 6 Geo. I. c. 23. if any person shall wilfully and maliciously tear, spoil, cut, burn, or deface the garments or clothes of any person passing in the public streets or highways, with intent so to do, he shall be guilty of felony, and transported for seven years.

By 4 Geo. III. c. 37. and 22 Geo. III. c. 40. to break or enter with force into any house, shop, or place, with intent to cut or destroy any linen yarn, linen cloth, serge, or other woollen goods, velvet, wrought silk, or other silk manufacture, cotton, calico, or other cotton or linen manufacture, or any of the tools, implements, or utensils used in manufacturing the same, is felony without benefit of clergy.

By the 57 Geo. III. c. 126. to enter, either by day or night, by force into any house, shop, or place, with an intent to cut or destroy any frame-work knitted pieces, stocking, or lace, or other articles or goods being in the frame, or upon any machine or engine thereto annexed, and to destroy any frame, machine, tool, or utensil, used in or for the working and making of any such frame-work knitted pieces, or to cut or destroy the same, is felony, and subjects the offender to transportation for life, or seven years, at the discretion of the judge.

By 6 Geo. II. c. 37. to cut any hop-binds, growing upon poles in any plantation of hops, is felony without benefit of clergy. But by the 4 Geo. IV. c. 40. the punishment is transportation for life or for seven years, or to be imprisoned and kept to hard labour, or to be imprisoned only, for not exceeding seven years.

By 1 Geo. IV. wilfully or maliciously to do or commit any damage, injury, or spoil, to or upon any building, fence, hedge, gate, stile, guide-post, mile-stone, tree, wood, underwood, orchard, garden-ground, nursery-ground, crops, vegetables, plants, land, or other matter or thing growing or being thereon, or to or upon real or personal property of any nature or kind soever, subjects the offender to the penalty of 5*l.* if the damage extends to that sum; and, in default of payment, the offender may be committed to prison and kept to hard labour for three months, but male persons under sixteen for six weeks only. Persons offending may be taken before a justice without any warrant. This act is not to affect any act for trespasses above 5*l.* nor where the party trespassing acted under a fair and reasonable supposition that he had a right so to do, or to any person qualified to kill game, who shall have committed such trespass in hunting, or in the pursuit of any kind of game.

By the 50 Geo. III. stage coachmen were made subject to fines for accidents occasioned by their wilful misconduct, which by the 1 Geo. IV. was extended to furious driving or racing.

These provisions are, however, still further extended by the 3 Geo. IV. c. 95. in which it is declared, that if the coachman, guard, or other person having the care of any coach, mail coach, or other carriage or vehicle, or employed in, upon, or about the same, shall, by intoxication, or wanton or furious driving, or any other wilful misconduct, on the public highway, injure or endanger any person or persons whatever in their life or lives, limbs, or property, every such coachman or person so offending shall, on conviction before a magistrate, forfeit and pay not less than 5*l.* nor more than 10*l.* for every such offence, and, on default of payment, be committed to the common gaol or house of correction for not exceeding six nor less than three months.

But nothing in this act shall affect hackney coaches or chariots, or their owners or drivers respectively. § 11.

All summonses, informations, and convictions, against any owner or proprietor of any coach, carriage, &c. for the recovery of any fine or penalty, shall, in all cases in which there shall be more than one owner or proprietor, and such owners or proprietors shall reside in different counties, be issued, laid, or prosecuted against such of the said owners or proprietors as shall reside in the county or place in which, or nearest to which, the offence shall have been committed. § 12.

And in all cases where any coach or other carriage used for the purpose of conveying passengers for hire, shall take up any passenger after it shall have entered the paved streets of London, Westminster, or the borough of Southwark, and shall carry and convey such passenger along the said paved streets, or any of them, the proprietor or driver thereof shall be deemed a person standing, driving, and plying for hire. § 13.

CHAPTER XV.

Of Forgery.

FORGERY is the fraudulent making or altering of a writing to the prejudice of another man's right.

The laws for the punishment of forgery are very numerous; it will be sufficient in this place to notice the most important.

By the 13 Geo. III. c. 52 and 59. forging or counterfeiting any stamp or mark to denote the standard of gold and silver plate, and certain other offences of the like tendency, were punished with transportation for fourteen years. But by 24 Geo. III. st. 2. c. 53. such offences are made capital felonies.

By 12 Geo. III. c. 48. certain frauds on the stamp duties therein described, principally by using the same stamp more than once, are made single felony, punishable by transportation for seven years.

By 24 Geo. III. st. 2. c. 37. to forge the superscription of a letter, in order to avoid payment of the postage, is felony, punishable by transportation for seven years.

By 43 Geo. III. any person convicted of forging any promissory note or bill of exchange, with intent to defraud any foreign prince or minister, shall be liable to transportation for any term not exceeding fourteen years. It is immaterial whether the instrument be composed in English or a foreign language, or both together.

By 55 Geo. III. c. 184. to forge or counterfeit any stamp or die, or any part thereof, or to utter or expose for sale any vellum, parchment, or paper impressed with such forged or counterfeited stamp or die, or to cut, tear, or get off any stamp or impression, with intent to use the same for any other paper or instrument, is felony without benefit of clergy.

And by the same statute, c. 185. to forge or counterfeit any plate, stamp, or die, for any almanack, newspaper, stage-coach licence, or expose to sale the same, or secretly or knowingly use the same, is a capital offence. Also, by the same act, to counterfeit any mark, stamp, or die, on any gold or silver plate, or to transpose or remove any such mark, or to sell, exchange, or export any such counterfeited mark, or knowingly to have such in possession, is felony without benefit of clergy.

But the most important act with regard to forgery is the 45 Geo. III. c. 89. which enacts, that if any person shall falsely make, forge, counterfeit, or alter, or cause or procure to be so done, or wilfully act or assist in so doing, any deed, will, testament, bond, writing obligatory, bill of exchange, promissory note for payment of money, indorsement or assignment thereon, acceptance of any bill of exchange, or any acquittance or receipt either for money or goods, or any accountable receipt for any note, bill, or other security for payment of money, or any warrant or order for payment of money or delivery of goods, with intention to defraud any person or persons, bodies politic or corporate whatsoever, or shall offer, dispose of, or put away any of the aforesaid, every person so convicted shall be guilty of felony without benefit of clergy.

And if any person shall forge, counterfeit, or alter any bank note, bank bill of exchange, dividend warrant, or any bond or obligation of the Bank of England, or any indorsement thereon, or shall offer, dispose of, or put away any such, or demand the payment thereof, knowing the same to be forged, &c. every such person shall be guilty of felony without benefit of clergy. § 2.

And any person making or using, or having in his possession (except officers of the Bank of England) frames for making paper of the description of that used by the Bank of England, or shall manufacture, use, or expose to sale, or aid or assist therein, any such paper, or shall knowingly have in his possession any such paper; or if any person, by any art or contrivance, shall cause or procure the numerical sum of any bank note, &c. in words to appear visible in the substance of such paper, or knowingly aid or assist therein, shall be transported for fourteen years. § 3.

And if any person shall purchase or receive any forged or counterfeited bank note, &c. knowing the same to be so, or shall knowingly have in his possession or in his house any such note, &c. without lawful excuse (the proof to lie on the person accused) such person shall be transported for fourteen years. § 6.

And if any person shall engrave, cut, etch, scrape, &c. or shall cause or procure to be so done, or shall knowingly aid or assist in so doing, upon any plate of copper, brass, steel, pewter, or any other metal, or upon any wood or other materials, any bank note, &c. of the Bank of England, or shall use any such, or shall knowingly have in his possession any such, or shall wilfully utter, publish, or dispose of any such as aforesaid, such person shall on conviction be transported for fourteen years. § 7.

By the 41 Geo. III. c. 57. no person shall make or use, or cause

to be so done, or knowingly assist in so doing, any frame or mould for making paper with the name or firm of any persons or bodies corporate appearing in the substance of the paper, without a written authority for that purpose, or shall make or vend, or cause to be so done, such paper; and no person without such authority shall cause any name or firm to appear on the substance of such paper, on pain of being imprisoned for such offences for not more than two years nor less than six months, and for the second offence to be transported for seven years. § 1.

By section 2. no person shall engrave, cut, etch, scrape, or cause to be so done, or knowingly assist in so doing, any bill or note of any person or persons, body corporate, banking company, &c. or use any plate so engraved, or any device for making or printing such bill or note, or shall knowingly have in his custody such plate or device or shall utter such bill or note without a written authority for that purpose, under the like penalty.

And by section 3. no person shall engrave, &c. on any plate, any subscriptions subjoined to any note or bill of any person or banking company, &c. payable to bearer on demand, or have in his possession any such plate, on pain of being imprisoned for not more than three years nor less than twelve months, and for the second offence to be transported for seven years.

CHAPTER XVI.

Of Recognizances.

HAVING enumerated the several crimes known to the law of England, we are next to consider the means of preventing them. This consists in obliging those whom there is reason to suspect of future misbehaviour to find security to keep the peace.

This security consists in being bound, with one or more sureties, in a recognizance or obligation to the king, whereby the parties acknowledge themselves to be indebted to the crown in the sum required (for instance 100*l.*) with condition to be void and of none effect, if the party shall appear in court on such a day, and in the mean time shall keep the peace, either generally towards the king and all his liege people, or particularly also with regard to the person who craves the security. Or, if it be for the good behaviour, then on condition that he shall demean and behave himself well, or be of good behaviour, either generally or specially, for the time therein limited, as for one or more years, or for life.

This recognizance must be certified to the next session; and if the condition be broken, by any breach of the peace in the one case, or any misbehaviour in the other, the recognizance becomes forfeited; and being *estreated* and sent up to the exchequer, the party and his sureties are sued for the several sums in which they are respectively bound.

Any justice of the peace may demand such security according to his own discretion; or it may be granted at the request of any

subject, upon due cause shewn, provided such demandant be under the king's protection.

Or if the justice be averse to act, it may be granted by a mandatory writ, called a *supplicavit*, issuing out of the Court of King's Bench or Chancery, which will compel the justice to act as a ministerial and not as a judicial officer; and he must make a return to such writs, specifying his compliance, under his hand and seal. But this writ is seldom used; for when application is made to the superior courts, they usually take the recognizances there, under the directions of the 21 Jac. I. c. 8.

Wives may demand sureties against their husbands; or husbands against their wives. But *femmes couvertes*, and infants under age, ought to find security by their friends only.

A recognizance may be discharged, either by the demise of the king, or by the death of the principal party bound thereby; or by order of the court to which such recognizance is certified, if it see sufficient cause; or in case he at whose request it was granted, will release it, or does not make his appearance to pray that it may be continued.

Any justice of the peace may, *ex officio*, bind all those to keep the peace, who in his presence make any affray, or threaten to kill or beat another, or contend together, or go about with unusual weapons or attendance, and all such as he knows to be common barretors, and such as are brought before him by the constable for a breach of the peace, and all such as, having been before bound to the peace, have broken and forfeited their recognizances.

Also, wherever any private man hath just cause to fear that another will burn his house, or do him a corporal injury, or that he will procure others so to do, he may demand surety of the peace against such person: and every justice is bound to grant it, if he who demands it will make oath that he is actually under fear of death or bodily harm, and will shew that he has just cause to be so, by reason of the other's menaces, attempts, or having lain in wait for him; and will also farther swear, that he does not require such surety out of malice.

Such recognizance for keeping the peace, when given, may be forfeited by any actual violence, or even an assault or menace, to the person of him who demanded it, if it be a special recognizance; or if the recognizance be general, by any unlawful action whatsoever, that either is or tends to a breach of the peace, or by any private violence committed against any of his majesty's subjects.

But a bare trespass upon the lands or goods of another, which is a ground for a civil action, unless accompanied with a wilful breach of the peace, is no forfeiture of the recognizance. Neither are mere reproachful words, as calling a man a *knave* or *liar*, any breach of the peace, so as to forfeit one's recognizance (being looked upon to be merely the effect of unmeaning heat and passion), unless they amount to a challenge to fight.

Justices are empowered by the 34 Edw. III. c. 1. to bind over to their good behaviour towards the king and his people all them that be not of good fame, wherever they are found; to the intent that the people be not troubled nor endamaged, nor the peace

diminished, nor merchants and others passing by the highways of the realm be disturbed or put in the peril which may happen by such offenders.

Under the general words of this expression, *that be not of good fame*, it is held that a man may be bound to his good behaviour for causes of scandal *contra bonos mores*, as well as *contra pacem*; as for haunting bawdy-houses with women of bad fame, or for keeping such women in his own house, or for words tending to scandalize the government, or in abuse of the officers of justice, especially in the execution of their office.

Thus, also, a justice may bind over all night-walkers, eaves-droppers, such as keep suspicious company, or are reported to be pilferers or robbers, such as sleep in the day, and wake in the night, common drunkards, whoremasters, the putative fathers of bastards, cheats, idle vagabonds, and other persons whose misbehaviour may reasonably bring them within the general words of the statute, as persons not of good fame. But if he commit a man for want of sureties, he must express the cause thereof with convenient certainty, and take care that such cause be a good one.

It is now held and even acted upon, that justices may require bail of persons charged with libel, before the indictment is found: this doctrine, however, is not universally admitted; and the doubts upon it may possibly, ere long, be settled by the legislature.

A recognizance for good behaviour may be forfeited by all the same means as one for the security of the peace may be, and also by some others; as, by going armed with unusual attendance to the terror of the people, by speaking words tending to sedition, or by committing any of those acts of misbehaviour which the recognizance was intended to prevent; but not by barely giving fresh cause of suspicion of that which perhaps may never actually happen.

CHAPTER XVII.

Process of the Law in the Courts of Criminal Jurisdiction.

ARRESTS.

WE are now to consider the method of proceeding in the courts of criminal jurisdiction, having already, in the former part of our work, shewn the whole process of a civil suit: and, first, of an *arrest*, which is the apprehending or restraining one's person, in order to be forthcoming to answer an alleged or suspected crime. No man is to be arrested, unless charged with such a crime as will at least justify holding him to bail when taken. In general, an arrest may be made four ways: by warrant, by an officer without warrant, by a private person also without a warrant, and by hue and cry.

A *warrant* may be granted in extraordinary cases by the privy council, or secretaries of state, but ordinarily by justices of the peace. This they may do in any case where they have a jurisdiction over the offence, in order to compel the person accused to appear before them; and this extends to all treasons, felonies, and breaches of the peace, and also to all such offences as they have power to punish by statute. This warrant ought to be under the hand and seal of the justice; should set forth the time and place of making, and the cause for which it is made; and should be directed to the constable or other peace-officer, (or it may be to any private person by name), requiring him to bring the party either generally before any justice of the peace for the county, or only before the justice who granted it; the warrant in the latter case being called a *special* warrant.

A general warrant to apprehend all persons suspected, without naming or particularly describing any person in special, is illegal and void: and a warrant to apprehend all persons guilty of a crime therein specified, is no legal warrant. It is, in fact, no warrant at all, for it will not justify the officer who acts under it; whereas a warrant properly penned (even though the magistrate who issues it should exceed his jurisdiction) will, by the 24 Geo. II. c. 44. at all events indemnify the officer who executes the same ministerially. And when a warrant is received by the officer, he is bound to execute it, so far as the jurisdiction of the magistrate and himself extends.

A warrant from the chief or other justice of the Court of King's Bench, extends all over the kingdom, and is tested or dated *England*; not *Oxfordshire*, *Berks*, or other particular county. But the warrant of a justice of the peace in one county, as *Yorkshire*, must be backed, that is, signed by a justice of the peace in another, as *Middlesex*, before it can be executed there.

By 13 Geo. III. c. 31. any warrant for apprehending an English offender who may have escaped into Scotland, and *vice versa*, may be indorsed and executed by the local magistrates, and the offender conveyed back to that part of the United Kingdom in which such offence was committed.

And now, by the 44 Geo. III. c. 92. if any offender have escaped from Ireland into England or Scotland, or *vice versa*, he may be apprehended by a warrant indorsed by a justice of the peace of the county or jurisdiction within which the offender shall be found; and he may be conveyed to that part of the United Kingdom in which the warrant issued, and the offence is charged to have been committed.

Arrests by officers without warrant may be executed by a justice of the peace, who may himself apprehend, or cause to be apprehended, by word only, any person committing a felony or breach of the peace in his presence. The sheriff and the coroner may apprehend any felon within the county without warrant. The constable hath great original and inherent authority with regard to arrests: he may, without warrant, arrest any one for a breach of

the peace committed in his view, and carry him before a justice of the peace; and in case of felony actually committed, or a dangerous wounding, whereby felony is likely to ensue, he may upon probable suspicion arrest the felon, and for that purpose is authorized (as upon a justice's warrant) to break open doors, and even to kill the felon, if he cannot otherwise be taken; and if he or his assistants be killed in attempting such arrest, it is murder in all concerned.

Watchmen, either those appointed by the statute of Winchester, 13 Edw. I. c. 4. to keep watch and ward in all towns from sun-setting to sun-rising, or such as are mere assistants to the constable, may *virtute officii* arrest all offenders, and particularly night-walkers, and commit them to custody till the morning.

Any *private person*, who is present when any felony is committed, is bound by the law to arrest the felon, on pain of fine and imprisonment, if he escape through the negligence of the standers-by. And they may justify breaking open the doors upon following such felon; and if they kill him, provided he cannot be otherwise taken, it is justifiable; though if they are killed in endeavouring to make such arrest, it is murder. Upon probable suspicion also a private person may arrest the felon, or other person so suspected; but he cannot justify breaking open doors to do it: and if either party kill the other in the attempt, it is manslaughter, and no more. Where a felony has been actually committed, a private person acting with a good intention, and upon such information as amounts to a reasonable and probable ground of suspicion, is justified in apprehending without a warrant the suspected person, in order to carry him before a magistrate.

But where a private person had delivered another into the custody of a constable, upon a suspicion which appeared afterwards to be unfounded, it was held that the person so arrested might maintain an action of trespass for an assault and false imprisonment against such private person, although a felony had been actually committed. But a peace officer, upon reasonable charge of felony, may justify an arrest without a warrant, although no felony has been committed.

COMMITMENT.

When a criminal is arrested, the justice before whom he is brought is bound immediately to examine the circumstances of the crime alleged: and to this end, by 2 & 3 Ph. & M. c. 10. he is to take in writing the examination of such prisoner, and the information of those who bring him. If upon this inquiry it manifestly appears, that either no such crime was committed, or that the suspicion entertained of the prisoner was wholly groundless, in such cases only it is lawful totally to discharge him. Otherwise he must either be committed to prison, or give bail, that is, put in securities for his appearance to answer the charge against him. This commitment therefore being only for safe custody, wherever bail will answer the same intention, it ought to be taken, as in most of the inferior crimes; but in felonies, and other offences of a capital nature, no bail can be a security equivalent to the actual custody of the person.

BAIL.

To refuse or delay to bail any person bailable, is an offence against the liberty of the subject in any magistrate, by the common law, as well as by the stat. West. I. c. 15. and the *Habeas Corpus* act. Bail may be taken either in court, or in some particular cases by the sheriff, coroner, or other magistrate, but most usually by the justices of the peace.

By the common law all felonies were bailable, till murder was excepted by statute, so that persons might be admitted to bail before conviction almost in every case. But the statute Westm. I. 3 Edw. I. c. 15. takes away the power of bailing in treason and in divers instances of felony. The 23 Hen. VI. c. 9. and 1 & 2 P. & M. c. 13. give farther regulations in this matter.

No justice of the peace can bail upon an accusation of treason; nor of murder; nor in manslaughter, if the prisoner be clearly the slayer, and not barely suspected to be so, or if any indictment be found against him; nor such as being committed for felony, have broken prison; persons outlawed; such as have abjured the realm; approvers, and persons by them accused; persons taken with the mainour or in the fact of felony; persons charged with arson; excommunicated persons taken by writ *de excommunicato capiendo*; all which are clearly not admissible to bail by the justices.

Others are of a dubious nature, as thieves openly defamed and known; persons charged with other felonies, or manifest and enormous offences, not being of good fame; and accessaries to felony, that labour under the same want of reputation; these seem to be in the discretion of the justices, whether bailable or not.

The last class are such as must be bailed upon offering sufficient surety, as persons of good fame charged with a bare suspicion of manslaughter or other inferior homicide; such persons being charged with petit larceny or any felony not before specified, or being accessory to any felony.

Lastly, the Court of King's Bench (or any judge thereof in time of vacation) may bail for any crime whatsoever, be it treason, murder, or any other offence, according to the circumstances of the case.

If the offence be not bailable, or the party cannot find bail, he is to be committed to the county gaol by the *mittimus* of the justice, or warrant under his hand and seal, containing the cause of his commitment.

CHAPTER XVIII.

Of the several Modes of Prosecution.

THE next step towards the punishment of offenders is their prosecution: and this is either upon a previous finding of the

fact by the grand jury, or without such previous finding. The former way is either by *presentment* or *indictment*.

PRESENTMENT.

A *presentment*, *generally* taken, is a very comprehensive term; including not only presentments properly so called, but also inquisitions of office, and indictments by a grand jury.

A *presentment*, *properly* speaking, is the notice taken by a grand jury of any offence from their own knowledge or observation, without any bill of indictment laid before them; as the *presentment* of a nuisance, a libel, and the like; upon which the officer of the court must afterwards frame an indictment, before the party presented can be put to answer it.

INDICTMENT.

An *indictment* is a written accusation of one or more persons of a crime or misdemeanor, preferred to and presented upon oath by a grand jury. To this end the sheriff of every county is bound to return to every session of the peace, and every commission of *oyer* and *terminer* and of general gaol-delivery, twenty-four good and lawful men of the county,* some out of every hundred, to inquire, present, do, and execute all those things, which on the part of our lord the king shall then and there be commanded them. As many as appear upon this pannel are sworn upon the grand jury, to the amount of twelve at the least, and not more than twenty-three, that twelve may be a majority. The grand jury are previously instructed in the articles of their inquiry, by a charge from the judge who presides upon the bench. They then withdraw, to sit and receive indictments, which are preferred to them; and they are only to hear evidence on behalf of the prosecution.

The grand jury are sworn to inquire only for the body of the county, *pro corpore comitatus*; and therefore they cannot regularly inquire of a fact done out of the county for which they are sworn, unless particularly enabled by an act of parliament.

By 2 Geo. II. c. 21. if the stroke or poisoning causing death be in England, and the death upon the sea or out of England, or *vice versa*, the offenders and their accessaries may be indicted in the county where either the death, poisoning, or stroke, shall happen.

And so in some other cases, as particularly where treason is committed out of the realm, it may be inquired of in any county within the realm, as the king shall direct. And counterfeiters, washers, or minishers of the current coin, together with all manner of felons and their accessaries, may be indicted and tried for those offences, if committed in any part of Wales, before the justices of gaol-delivery and of the peace in the next adjoining county of England, where the king's writ runneth.

Murders also, whether committed in England or in foreign parts,

* It is now held by the Court of King's Bench, that a grand juror need not possess any qualification whatever in point of property, that is, he need not be a freeholder nor even a leaseholder. *Easter Term, 1819.*

may be inquired of and tried by the king's special commission, in any shire or place in the kingdom; but the person tried must have been previously examined before three at the least of his majesty's privy council.

By 10 & 11 W. III. c. 25. all robberies and other capital crimes committed in Newfoundland may be inquired of and tried in any county in England. Offences against the Black Act may be inquired of and tried in any county in England, at the option of the prosecutor.

So felonies in destroying turnpikes, or works upon navigable rivers, erected by authority of parliament, may be inquired of and tried in any adjacent county.

By the 59 Geo. III. c. 27. felonies committed on board any barge, boat, trow, or other vessel whatever, on any navigable river or canal in any part of the United Kingdom, may be inquired of and tried in any adjacent county.

And by the 59 Geo. III. c. 96. in any felony committed on any stage coach, stage waggon, stage cart, or other such carriage, it is sufficient to allege that such felony was committed within any county or city through which such carriages shall pass in the course of their journey. And by the same act any felony committed on the boundaries of any two counties, or within 500 yards of either county, the offence may be alleged to be committed in either county, and may be tried in the county so alleged.

By the 56 Geo. III. c. 73. in indictments for grand or petit larceny belonging to the property of any mining company, it is sufficient to name one of the partners of such company.

By 26 Geo. II. c. 19. plundering or stealing from any vessel in distress, or wrecked, or breaking any ship, contrary to 12 Ann. st. 2. c. 18. may be prosecuted either in the county where the fact is committed, or in any county next adjoining; and if committed in Wales, then in the next adjoining English county.

Felonies committed out of the realm, in burning or destroying the king's ships, magazines, or stores, may be inquired of and tried in any county of England, or in the place where the offence is committed.

By 13 Geo. III. c. 63. misdemeanors committed in India may be tried upon information or indictment in the Court of King's Bench in England; and a mode is marked out for examining witnesses by commission, and transmitting their depositions to the court.

But, in general, all offences must be inquired into as well as tried in the county where the fact is committed. Yet if larceny be committed in one county, and the goods be carried into another, the offender may be indicted in either; for the offence is complete in both. Or he may be indicted in England for larceny in Scotland, and carrying the goods with him into England, or *vice versa*; or for receiving in one part of the United Kingdom goods that have been stolen in another. But for robbery, burglary, and the like, he can only be indicted where the fact was actually committed;

for though the carrying away and keeping the goods be a continuation of the original taking, and is therefore larceny in the second county, yet it is not a robbery or burglary in that jurisdiction.

And if a person be indicted in one county for larceny of goods originally taken in another, and be thereof convicted, or stand mute, he shall not be admitted to his clergy: provided the original taking be attended with such circumstances as would have ousted him of his clergy by virtue of any statute made previous to the year 1091. The 33 Hen. VIII. c. 23. did not extend to accessaries before the fact, in the case of murder, nor to the crime of manslaughter; but by the 43 Geo. III. c. 113. such accessaries and persons indicted for manslaughter may be tried according to that statute, as if they had been expressly mentioned in it; and a person indicted under it for murder may be found guilty of manslaughter.

By 24 Geo. III. c. 25. all British subjects holding offices under his majesty, or the East-India Company, may be brought to condign punishment for extortion and other misdemeanors committed in the East Indies, upon an information moved in, and granted by the Court of King's Bench, or exhibited by the attorney-general, or the East-India Company. And such information may be tried by a special commission, in which the commissioners shall be three judges, one from each of the courts at Westminster, four peers, and six members of the house of commons, who are to be appointed according to the special directions of the statute. These commissioners have power to proceed, and to pronounce judgment according to the common law of England, and also to declare the party convicted incapable of serving the East-India Company; and such proceedings and judgment shall be final, and shall not be questioned in any other court.

By the 11 & 12 Geo. III. c. 12. governors and commanders-in-chief might be prosecuted and punished by the Court of King's Bench, or by a special commission in England, for acts of oppression or crimes committed in colonies and plantations beyond the seas.

And by the 42 Geo. III. c. 85. it is enacted, that if any person whatever, employed in the service of his majesty, in any civil or military capacity whatever, shall commit any crime or offence in the execution of his office, he may be tried for it in England upon an indictment, or upon an information exhibited by the attorney-general; and such misdemeanor may be charged to have been committed in the county of Middlesex; and, besides the punishment by the common law for such misdemeanor, the Court of King's Bench, at their discretion, may adjudge the party convicted to be incapable of serving his majesty, or of holding any public employment. The statute then directs how evidence may be obtained abroad, either to support the prosecution or the defence of the party prosecuted.

When the grand jury have heard the evidence, if they think it a groundless accusation, they return "Not a true bill," or "Not found;" and then the party is discharged. But a fresh

bill may afterwards be preferred to a subsequent grand jury. If they are satisfied of the truth of the accusation, they then indorse upon it "A true bill." The indictment is then said to be found, and the party stands indicted. But to find a bill, there must at least twelve of the jury agree; for no man can be convicted at the suit of the king of any capital offence, unless by the unanimous voice of twenty-four of his equals and neighbours; that is, by twelve of the grand jury in the first place, and afterwards by the whole petit jury. But if twelve of the grand jury assent, it is a good presentment, though some of the rest disagree. And the indictment, when so found, is publicly delivered into court.

Indictments must have a precise and sufficient certainty. By 1 Hen. V. c. 5. all indictments must set forth the christian name, surname, and addition of the state and degree, mystery, town, or place, and the county, of the offender; and all this to identify the person.

The *time* and *place* are also to be ascertained by naming the day and township in which the fact was committed; though a mistake in these points is in general not held to be material, provided the *time* be laid previous to the finding of the indictment, and the *place* to be within the jurisdiction of the court; unless where the place is laid, not merely as a *venue*, but as part of the description of the fact. But sometimes the *time* may be very material, where there is any limitation in point of time assigned for the prosecution of offenders; as by the 7 W. III. c. 3. which enacts, that no prosecutions shall be had for any of the treasons or misprisions therein mentioned (except an assassination designed or attempted on the person of the king), unless the bill of indictment be found within three years after the offence committed; and in case of murder, the time of the death must be laid within a year and a day after the mortal stroke was given.

The *offence* itself must also be set forth with clearness and certainty. Thus, in treason, the facts must be laid to be done *treasonably and against his allegiance*, or the indictment is void. In indictments for murder, it is necessary to say that the party indicted *murdered*, not *killed* or *slew*, the other. In all indictments for felonies, the adverb *feloniously* must be used; and for burglaries also, *burglariously*: and all these to ascertain the intent. In rapes, the word *rapuit*, or *ravished*, is necessary, and must not be expressed by any periphrasis, in order to render the crime certain. So, in larcenies also, the words *feloniously took and carried away* are necessary to every indictment; for these only can express the very offence. Also, in indictments for murder, the length and depth of the wound should in general be expressed, in order that it may appear to the court to have been of a mortal nature; but if it go through the body, then its dimensions are immaterial, for that is apparently sufficient to have been the cause of the death. Also, where a limb, or the like, is absolutely cut off, there such description is impossible.

Lastly, in indictments, the *value* of the thing which is the sub-

ject or instrument of the offence must sometimes be expressed. In indictments for larcenies this is necessary, that it may appear whether it be grand or petit larceny, and whether entitled or not to the benefit of clergy; in homicide of all sorts it is necessary, as the weapon with which it is committed is forfeited to the king as a *deodand*.

INFORMATIONS.

Informations are of two sorts; first, those which are partly at the suit of the king, and partly at that of a subject; and secondly, such as are only in the name of the king. The former are usually brought upon penal statutes, which inflict a penalty upon conviction of the offender, one part to the use of the king, and another to the use of the informer; and are a sort of *qui tam* actions, only carried on by a criminal instead of a civil process.

By the 31 Eliz. c. 5. no prosecution upon any penal statute, the suit and benefit whereof are limited in part to the king and in part to the prosecutor, can be brought by any common informer after one year is expired since the commission of the offence; nor on behalf of the crown, after the lapse of two years longer; nor, where the forfeiture is originally given only to the king, can such prosecution be had after the expiration of two years from the commission of the offence.

The informations that are exhibited in the name of the king are also of two kinds: first, those which are truly and properly his own suits, and filed *ex officio* by the attorney-general; secondly, those in which, though the king is the nominal prosecutor, yet it is at the relation of some private person or common informer; and they are filed by the king's coroner and attorney in the Court of King's Bench, usually called the master of the crown office.

The objects of the king's own prosecutions, filed *ex officio* by the attorney general, are properly such enormous misdemeanors as peculiarly tend to disturb or endanger the government, or which tend to bring into contempt the royal person and authority.

The objects of the other species of informations, filed by the master of the crown office upon the complaint or relation of a private subject, are any gross and notorious misdemeanors, riots, batteries, libels, and other immoralities of an atrocious kind. And when an information is filed, either thus, or by the attorney-general *ex officio*, it must be tried by a jury of the county where the offence arises. If an information, or an indictment for a misdemeanor, removed into the Court of King's Bench by *certiorari*, be not of such importance as to be tried at the bar of the court, it is sent down by writ of *nisi prius* into the county where the crime is charged to have been committed; and is there tried either by a common or a special jury, like a record in a civil action; and if the defendant be found guilty, he must afterwards receive judgment from the Court of King's Bench.

In prosecutions in the name of the king, the plaintiff cannot, in conducting his own cause, address the jury, as in other actions; this being by the rules of court only competent for counsel to do.

By the 60 Geo. III. c. 4. § 1. it is enacted, that in all cases of prosecutions for misdemeanors instituted by his majesty's attorney or solicitor-general, the court shall, if required, make order that a copy of the information or indictment shall be delivered, after appearance, to the party prosecuted, or his clerk in court or attorney, upon application made for the same, free from all expence to the party so applying; provided that such party, or his clerk in court, or attorney, shall not have previously received a copy thereof. And by § 9 of the same act it is provided, that in case any prosecution for a misdemeanor instituted by his majesty's attorney or solicitor-general shall not be brought to trial within twelve calendar months next after the plea of Not guilty shall have been pleaded therein, it shall be lawful for the court in which such prosecution shall be depending, upon application to be made on the behalf of any defendant in such prosecution, of which application twenty days previous notice shall have been given to his majesty's attorney or solicitor-general, to make an order, if the said court shall see just cause so to do, authorizing such defendant to bring on the trial in such prosecution; and it shall thereupon be lawful for such defendant to bring on such trial accordingly, unless a *nolle prosequi* shall have been entered in such prosecution.

CHAPTER XIX.

Of Process upon an Indictment.

WE are next to inquire into the manner of issuing *process*, after indictment found. We have hitherto supposed the offender to be in custody before the finding of the indictment; in which case he is immediately to be arraigned thereon. But if he have fled, or secreted himself, in capital cases; or have not, in small misdemeanors, been bound over to appear at the assizes or sessions; still an indictment may be preferred against him in his absence. And if it be found, then process must issue to bring him into court: for the indictment cannot be tried unless he personally appear, according to the rules of equity in all cases, and the express provision of the 28 Edw. III. c. 3. in capital ones, that no man shall be put to death without being brought to answer by due process of law.

The proper process on an indictment for any petty misdemeanor, or on a penal statute, is a writ of *venire facias*, which is in the nature of a summons to cause the party to appear. And if, by the return to such *venire*, it appear that the party have lands in the county whereby he may be distrained, then a *distress infinite* shall be issued from time to time till he appear.

But if the sheriff return that he hath no lands in his bailiwick, then (upon his non-appearance) a writ of *capias* shall issue, which

commands the sheriff to take his body, and have him at the next assizes; and if he cannot be taken upon the first *capias*, a second and third shall issue, called an *alias* and a *pluries capias*.

But on indictments for treason or felony, a *capias* is the first process; and for treason or homicide, only one shall be allowed to issue, or two in the case of other felonies, though the usage is to issue only one in any felony. And so in the case of misdemeanors, it is now the usual practice for any judge of the Court of King's Bench, upon certificate of an indictment found, to award a writ of *capias* immediately, in order to bring in the defendant. But if he abscond, and it is thought proper to pursue him to an outlawry, then a greater exactness is necessary. For, in such case, after the several writs have issued in a regular number, according to the nature of the respective crimes, without any effect, the offender shall be put in the *exigent*, in order to his outlawry; that is, he shall be exacted, proclaimed, or required to surrender, at five county courts; and if he be returned *quinto exactus*, and do not appear at the fifth exaction or requisition, then he is adjudged to be *outlawed*, or put out of the protection of the law; so that he is incapable of taking the benefit of it in any respect, either by bringing an action or otherwise.

The punishment for outlawries upon indictments for misdemeanors is the same as for outlawries upon civil actions, *viz.* forfeiture of goods and chattels. But an outlawry in treason or felony amounts to a conviction and attainder of the offence charged in the indictment, as much as if the offender had been found guilty. His life is, however, still under the protection of the law; and any person may arrest an outlaw on a criminal prosecution, either of his own head or by writ or warrant of *capias utlagatum*, in order to bring him to execution.

But such outlawry may be frequently reversed by writ of error, the proceedings therein being exceedingly nice and circumstantial; and if any single minute point be omitted or misconducted, the whole outlawry is illegal, and may be reversed: upon which reversal the party accused is admitted to plead to, and defend himself against the indictment.

ARRAIGNMENT.

When the offender either appears voluntarily to an indictment, or was before in custody, or is brought in upon criminal process to answer it in the proper court, he is immediately to be arraigned thereon.

To *arraign* is nothing else but to call the prisoner to the bar of the court to answer the matter charged upon him in the indictment. The prisoner is to be called to the bar by his name; and he must be brought without irons, or any manner of shackles or bonds, unless there be danger of an escape.

When he is brought to the bar, he is called upon by name to hold up his hand. Then the indictment is to be read to him; after which he is asked whether he be guilty, or not guilty.

When a prisoner is arraigned, he either *stands mute*, or *confesses* the fact, or else he *pleads* to the indictment.

Regularly a prisoner is said to *stand mute*, when, being arraigned for treason or felony, he either makes no answer at all, or answers foreign to the purpose, or with such matter as is not allowable, and will not answer otherwise; or, having pleaded Not guilty, refuses to put himself upon the country. If he say nothing, the court ought *ex officio* to impanel a jury to inquire whether he stands obstinately mute, or whether he be dumb *ex visitatione Dei*. If the latter appear to be the case, the judges (who are to be of counsel for the prisoner, and to see that he hath law and justice) proceed to the trial, and examine all points, as if he had pleaded Not guilty.

If he be found obstinately mute (which a prisoner hath been held to be that hath cut out his own tongue), then, if it be on an indictment of high treason, it hath long been settled, that standing mute is equivalent to a conviction, and he shall receive the same judgment and execution. And as in this the highest crime, so also in the lowest species of felony, viz. in petit larceny, and in all misdemeanors, standing mute has always been equivalent to conviction. And, by the 12 Geo. III. c. 20. every person who, being arraigned for felony and piracy, shall stand mute, or not answer directly to the offence, shall be convicted of the same: and the same judgment and execution (with all their consequences in every respect) shall be thereupon awarded, as if the person had been convicted by verdict, or confession, of the crime.

The other incident to arraignments, exclusive of the plea, is the prisoner's actual *confession* of the indictment. Upon a simple and plain confession, the court hath nothing to do but to award judgment: but it is usually very backward in receiving and recording such confession, and will generally advise the prisoner to retract it, and plead to the indictment.

TURNING KING'S EVIDENCE.

In all cases of coining, robbery, burglary, housebreaking, horse-stealing, and larceny to the value of five shillings from shops, warehouses, stables, and coach-houses, by statutes 4 & 5 W. & M. c. 8; 6 & 7 W. III. c. 17; 10 & 11 W. III. c. 23. and 5 Ann. c. 31. it is enacted, that if any offender, being out of prison, shall discover two or more persons who have committed the like offences, so as they may be convicted thereof, he shall, in case of burglary or housebreaking, receive a reward of 40*l.* and in general be entitled to a pardon of all capital offences, excepting only murder and treason, and of the last also in case of coining. And if any such person having feloniously stolen any lead, iron, or other metal, shall discover and convict two offenders of having illegally bought or received the same, he shall, by the 29 Geo. II. c. 30. be pardoned for all such felonies committed before such discovery. It hath also been usual for the justices of the peace, by whom any persons charged with felony are committed to gaol,

to admit some one of their accomplices to become *king's evidence*; upon an understanding, that if such accomplice make a full and complete discovery of that and of all other felonies to which he is examined by the magistrate, and afterwards give his evidence without prevarication or fraud, he shall not himself be prosecuted for that or any other previous offence of the same degree.

PLEA AND ISSUE.

We are now to consider the plea of the prisoner. This is either a plea to the jurisdiction; a demurrer; a plea in abatement; a special plea in bar; or the general issue.

A plea to the jurisdiction is where an indictment is taken before a court that hath no cognizance of the offence; as, if a man be indicted for a rape at the sheriff's tourn, or for treason at the quarter sessions: in these, or similar cases, he may except to the jurisdiction of the court.

A demurrer to the indictment.—This is incident to criminal cases as well as civil; when the fact as alleged is allowed to be true, but the prisoner joins issue upon some point of law in the indictment, by which he insists that the fact, as stated, is no felony, treason, or whatever the crime is alleged to be. Thus, for instance, if a man be indicted for *feloniously* stealing a greyhound, which is an animal in which no valuable property can be had; and therefore it is not felony, but only a civil trespass to steal it; in this case the party indicted may demur to the indictment, denying it to be felony, though he confesses to the act of taking it.

A plea in abatement is principally for a *misnomer*, a wrong name or a false addition to the prisoner: as, if *James Allen, gentleman*, be indicted by the name of *John Allen, esquire*, he may plead that he has the name of James, and not of John; and that he is a gentleman, and not an esquire: and if either fact be found by a jury, then the indictment shall be abated. But there is little advantage to the prisoner in these dilatory pleas; because if the exception be allowed, a new bill of indictment may be framed, according to what the prisoner in his plea avers to be his true name and addition.

Special pleas in bar.—These go to the merits of the indictment, and give a reason why the prisoner ought not to answer it at all. These are of four kinds: a former acquittal, a former conviction, a former attainder, or a pardon. There are many other pleas which may be pleaded in bar of an appeal; but these are applicable to both appeals and indictments.

First, the plea of a former acquittal is grounded on this universal maxim of the common law, that no man is to be tried for his life more than once for the same offence. And hence it is allowed, that when a man is once fairly found not guilty upon any indictment, or other prosecution, he may plead such acquittal in bar of any subsequent accusation for the same crime. Therefore an acquittal on an appeal is a good bar to an indictment on the same offence. And so also was an acquittal on an indictment a good bar to an appeal by the common law: and therefore, in favour of

appeals, a general practice was introduced, not to try any person on an indictment of homicide till after the year and day within which appeals may be brought were past; by which time it often happened that the witnesses died, or the whole was forgotten. To remedy which, the 3 Hen. VII. c. 1. enacts, that indictments shall be proceeded on immediately, at the king's suit, for the death of a man, without waiting for bringing an appeal; and the plea of *autrefois acquit*, or a former acquittal on an indictment, shall be no bar to the prosecuting of any appeal.

Secondly, the plea of *autrefois convict*, or a former conviction for the same identical crime, though no judgment was ever given, or perhaps will be (being suspended by the benefit of clergy or other causes), is a good plea in bar to an indictment. And it has been held, that a conviction of manslaughter, on an appeal or an indictment, is a bar even in another appeal, and much more in an indictment of murder; for the fact prosecuted is the same in both, though the offences differ in colouring and in degree. It is to be observed that the pleas of a former acquittal and former conviction, must be upon a prosecution for the same identical crime.

Thirdly, the plea of *autrefois attain*, or a former attainder; which is a good plea in bar, whether it be for the same or any other felony. For wherever a man is attainted of felony, by judgment of death, either upon a verdict, or confession, or outlawry, and whether upon an appeal or an indictment, he may plead such attainder in bar, to any subsequent indictment or appeal for the same or for any other felony; the reason of which is, that the prisoner being dead in law by the first attainder, his blood is already corrupted, and he hath forfeited all that he had; so that it is absurd and superfluous to endeavour to attain him a second time. But to this general rule there are some exceptions. As, where the former attainder is reversed for error, for then it is the same as if it had never been. And the same reason holds where the attainder is reversed by parliament, or the judgment vacated by the king's pardon, with regard to felonies committed afterwards. Where the attainder was upon indictment, such attainder is no bar to an appeal; for the prior sentence is pardonable by the king; and if that might be pleaded in bar of appeal, the king might in the end defeat the suit of the subject, by suffering the prior sentence to stop the prosecution of a second, and then, when the time of appealing is elapsed, granting the delinquent a pardon.

An attainder in felony is no bar to an indictment of treason.

Where a person attainted of one felony is afterwards indicted as principal in another, to which there are also accessaries prosecuted at the same time; it is held, that the plea of *autrefois attain* is no bar, because the accessaries to such second felony cannot be convicted till after the conviction of the principal.

Lastly, a *pardon* may be pleaded in bar. There is one advantage that attends pleading a pardon in bar, or in arrest of judgment, *before* sentence is past, which gives it by much the preference to pleading it after sentence or attainder; that is, that by stopping

the judgment, it stops the attainder, and prevents the corruption of the blood, which, when once corrupted by attainder, cannot afterwards be restored, otherwise than by act of parliament.

We will now consider the *general issue*, or plea of *not guilty*; upon which plea alone the prisoner can receive judgment. In case of an indictment of felony or treason, there can be no special justification put in by way of plea. As, on an indictment for murder, a man cannot *plead* that it was in his own defence against a robber on the highway, or a burglar; but he must plead the general issue, Not guilty, and give this special matter in evidence. For (besides that these pleas do in effect amount to a general issue, since, if true, the prisoner is most clearly not guilty, as the facts in treason are laid to be done *proditore et contra ligeantiam suam debitum*, and in felony that the killing was done *felonice*) these charges, of a traitorous or felonious intent, are the points and very *gist* of the indictment, and must be answered directly by the general negative, not guilty; and the jury, upon the evidence, will take notice of any defensive matter, and give their verdict accordingly, as effectually as if it were or could be specially pleaded.

When the prisoner hath pleaded Not guilty, the clerk of the assize, or clerk of the arraigns, on behalf of the crown, replies, that the prisoner is guilty, and that he is ready to prove him so.

When the prisoner has thus put himself upon his trial, the clerk answers, "God send thee a good deliverance!"

CHAPTER XX.

Of Trial.

WHEN a prisoner has pleaded *not guilty*, and for his trial hath put himself upon the country (which country the jury are), the sheriff of the county must return a pannel of jurors, *liberos et legales homines de vicineto*; that is, freeholders,* without just exception, and of the *visne* or neighbourhood, which is interpreted to be of the county where the fact is committed.

If the proceedings be before the Court of King's Bench, there is time allowed, between the arraignment and the trial, for a jury to be impannelled by a writ of *venire facias* to the sheriff, as in civil causes; and the trial, in case of a misdemeanor, is had at *nisi prius*, unless it be of such consequence as to merit a trial at bar, which is always invariably had when the prisoner is tried for any capital offence. But before commissioners of *oyer and terminer* and gaol-delivery, the sheriff, by virtue of a general precept directed to him

* Since the 4 & 5 W. & M. c. 24. which admits copyholders upon juries, it is not necessary that the jurors should be freeholders in criminal cases, except in treason, and there it is expressly required by the Bill of Rights, 1 W. & M. st. 2. and confirmed by subsequent statutes.

beforehand, returns to the court a pannel of forty-eight jurors, to try all felons that may be called upon their trial at that sessions; and therefore it is there usual to try all felons immediately, or soon after their arraignment. But it is not customary, nor agreeable to the general course of proceedings (unless by consent of parties, or where the defendant is actually in gaol), to try persons indicted of smaller misdemeanors at the same court in which they have pleaded *not guilty*, or *traversed* the indictment. But they usually give security to the court to appear at the next assizes or sessions, and then and there to try the traverse, giving notice to the prosecutor of the same. Every defendant indicted for a misdemeanor should give full eight days notice of trial to the prosecutor before the assizes, if the trial is to be there; if at the sessions, it is usual to give two or three days notice. Or, the justices at the sessions fix as a general rule what time they think a reasonable notice in such cases.

When the trial is called on, the jurors are to be sworn, as they appear, to the number of twelve, unless they are challenged by the prisoner.

CHALLENGES.

Challenges may be made, either on the part of the king, or on that of the prisoner; and either to the whole array, or to the separate polls. Where an alien is indicted, the jury should be half foreigners, if so many be found in the place. On every panel there should be a competent number of hundredors; and the particular jurors should be *omni exceptione majores*.

Challenges upon any of the foregoing accounts, are styled challenges *for cause*; which may be without stint, in both criminal and civil trials. But in criminal cases, or at least in capital ones, there is allowed to the prisoner an arbitrary and capricious species of challenge to a certain number of jurors, without shewing any cause at all; which is called a *peremptory* challenge.

This privilege of peremptory challenges, though granted to the prisoner, is denied to the king by the statute 33 Edw. I. st. 4. which enacts, that the king shall challenge no jurors without assigning a cause certain, to be tried and approved by the court. However, it is held, that the king need not assign his cause of challenge till all the pannel be gone through, and unless there cannot be a full jury without the persons so challenged. And then, and not sooner, the king's counsel must shew the cause; otherwise the jury shall be sworn. And the practice is the same both in trials for misdemeanors and for capital offences. Where there is a challenge for cause, two persons in court not of the jury are sworn to try whether the jurymen challenged will try the prisoner indifferently. Evidence is then produced to support the challenge; and, according to the verdict of the two tryers, the jurymen is admitted or rejected. A jurymen was thus set aside in O'Coigly's trial for treason, because, upon looking at the prisoners, he uttered the words "damned rascals."

The peremptory challenges of the prisoner must, however, have

some reasonable boundary; otherwise he might never be tried. This reasonable boundary is settled by the common law to be the number of thirty-five, that is, one under three full juries. But, by the 22 Hen. VIII. c. 14. (which, with regard to felonies, stands unrepealed by the 1 & 2 Ph. & Mar. c. 10.) no person arraigned for felony can be admitted to make any more than *twenty* peremptory challenges.

If, by reason of challenges, or the default of the jurors, a sufficient number cannot be had of the original panel, a *tales* may be awarded, as in civil causes, till the number of twelve is sworn.

When the jury is sworn, if it be a cause of any consequence, the indictment is usually opened, and the evidence brought forward against the prisoner. And it is a settled rule at common law, that no counsel shall be allowed a prisoner upon his trial upon the general issue in any capital crime, unless some point of law shall arise proper to be debated. But the judges never scruple to allow a prisoner's counsel to instruct him what questions to ask, or even to ask questions for him, with respect to matters of fact.

EVIDENCE.

The doctrine of evidence upon pleas of the crown is, in most respects, the same as that upon civil actions. There are, however, a few leading points, wherein by several statutes and resolutions, a difference is made between civil and criminal evidence.

In all cases of high treason, petit treason, and misprision of treason, by the 1 Edw. VI. c. 12. and 5 & 6 Edw. VI. c. 11. *two* lawful witnesses are required to convict a prisoner, unless he shall willingly and without violence confess the same.

By the 1 & 2 Ph. & Mar. c. 10. a farther exception is made as to treasons in counterfeiting the king's seals or signatures, and treasons concerning coin current within this realm; and more particularly by c. 11. the offences of importing counterfeit foreign money current in this kingdom, and impairing, counterfeiting, or forging any current coin.

The statutes 8 & 9 W. III. c. 25. and 15 & 16 Geo. II. c. 28. in their subsequent extensions of this species of treason, also provide, that the offenders may be indicted, arraigned, tried, convicted, and attainted, by the like evidence, and in such manner and form, as may be had and used against offenders for counterfeiting the king's money. But by the 7 W. III. c. 3. in prosecutions for those treasons to which that act extends, the same rule (of requiring two witnesses) is again enforced; with this addition, that the *confession* of the prisoner, which shall countervail the necessity of such proof, must be in *open court*. In the construction of which act it hath been holden, that a confession of the prisoner taken out of court before a magistrate or person having competent authority to take it, and proved by two witnesses, is sufficient to convict him of treason.

By the same statute it is declared, that both witnesses must be to the same overt act of treason, or one to one overt act, and the

other to another overt act of the same species of treason, and not of distinct heads or kinds: and no evidence shall be admitted to prove any overt act not expressly laid in the indictment. In almost every other accusation one positive witness is sufficient.

Evidence shewing the mere similitude of hand-writing in two papers, without other concurrent testimony, is no evidence that both were written by the same person; yet the testimony of witnesses well acquainted with the party's hand, that they believe the paper in question to have been written by him, is evidence to be left to a jury. But the proof of hand-writing is not evidence in high treason, unless the papers are found in the custody of the prisoner.

By 1 Ann. st. 2. c. 9. in all cases of treason and felony, all witnesses for the prisoner shall be examined upon oath, in like manner as the witnesses *against* him. By the 43 Geo. III. c. 58. it is enacted, that all women who shall be tried for the murder of their bastard children shall be tried by the same rules of evidence as if these statutes had never passed, provided that it shall be lawful for the jury to find that the prisoner was delivered of issue, which if born alive would have been a bastard, and that she did endeavour to conceal the birth thereof, and the court therefore may adjudge the prisoner to be committed to the gaol or house of correction for any time not exceeding two months.

When the evidence is closed, the jury cannot be discharged (unless in evident cases of necessity) till they have given in their verdict.* But the judges may adjourn, while the jury are withdrawn to confer, and return to receive the verdict in open court. And such public or open verdict may be either general, Guilty, or Not Guilty; or special, setting forth all the circumstances of the case, and praying the judgment of the court, whether, for instance, on the facts stated, it be murder, manslaughter, or no crime at all. This is where they *doubt* the matter of law, and therefore *choose* to leave it to the determination of the court; though they have an unquestionable right of determining upon all the circumstances; and finding a general verdict, if they think proper so to hazard a breach of their oaths; and if their verdict be notoriously wrong, they may be punished, and their verdict set aside by attainat at the suit of the king, but not at the suit of the prisoner.

On a conviction (or even upon an acquittal, where there was a reasonable ground to prosecute, and in fact a *bonâ fide* prosecution for any grand or petit larceny, or other felony, the reasonable expences of the prosecutor, and also a compensation for his trouble and loss of time, are to be allowed him out of the county stock, if he petition the judge for it; 58 Geo. III. c. 70. *Vide* page 229 of this work.

And, by the 27 Geo. II. c. 3. all persons appearing upon re-

* It is now settled, that when a criminal trial runs to such a length that it cannot be concluded in one day, the court, by its own authority, may adjourn till the next morning; but the jury must be somewhere kept together, that they may have no communication but with each other.

cognizance or *subpoena* to give evidence, whether any indictment be preferred or no, and as well without conviction as with it, are entitled to be paid their charges, with a farther allowance (if poor) for their trouble and loss of time. On a conviction of larceny in particular, the prosecutor shall have restitution of his goods. And it is now usual for the court, upon the conviction of a felon, to order (without any writ) immediate restitution of such goods as are brought into court to be made to the several prosecutors. Or else, secondly, without such writ of restitution, the party may peaceably retake his goods, wherever he happens to find them, unless a new property be fairly acquired therein. Or, lastly, if the felon be convicted and pardoned, or be allowed his clergy, the party robbed may bring his action of trover against him for his goods, and recover a satisfaction in damages. But the owner of goods stolen, who has prosecuted the thief to conviction, cannot recover the value of his goods from a person who has purchased them and sold them again, even with notice of the theft, before conviction.

And if the owner of goods lose them by a fraud, and not by a felony, and afterwards convict the offender, he is not entitled to restitution, or to retain them, against a person, as a pawnbroker, who has fairly acquired a new right of property in them.

THE BENEFIT OF CLERGY.

The benefit of clergy had its original from the pious regard paid by Christian princes to the church. The exemptions which they granted to the church were principally of two kinds: exemption of *places* consecrated to religious duties from criminal arrests, and exemption of the *persons* of clergymen from criminal process before the secular judge in a few particular cases.

The clergy, increasing in wealth and power, soon began to claim that as a right, which before they had obtained as a favour; and, not contented with a few exceptions, they boldly asserted a right to be exempted from all secular jurisdiction whatever.

In England, however, a total exemption of the clergy from secular jurisdiction could never be thoroughly effected; and therefore though the benefit of clergy was in *some* capital cases, yet it was not *universally* allowed. And, in such cases, it was usual for the bishop or ordinary to demand his clerks to be remitted out of the king's courts as soon as they were indicted. But in the reign of Hen. VI. it was settled, that the prisoner should first be arraigned, and might either *then* claim his benefit of clergy, by way of declinatory plea; or, *after conviction*, by way of arresting judgment.

In process of time the benefit of clergy was extended to all those who could read; but when learning began to be more generally diffused, it was found that as many laymen as clergymen were admitted to this; and therefore, by the 4 Hen. VII. c. 13. a distinction was drawn between mere lay scholars, and clerks that were really in orders. And though it was thought reasonable still to mitigate

the severity of the law with regard to the former, yet they were not put upon the same footing with actual clergy, being subjected to a slight degree of punishment, and not allowed to claim the clerical privilege more than once. Accordingly the statute directs, that no person once admitted to the clergy shall be admitted a second time, unless he produce his orders; and, to distinguish their persons, laymen shall be burned with a hot iron in the brawn of the left thumb. This distinction between learned laymen and real clerks in orders was abolished for a time by the 28 Hen. VIII. c. 1. and 32 Hen. VIII. c. 3. but restored by the 1 Edw. VI. c. 12. which statute enacts, that lords of parliament, and peers of the realm having voice and place in parliament, may have the benefit of their peerage, equivalent to that of clergy, for the first offence, (although they cannot read, and without being burnt in the hand) for all offences then clergyable to commoners, and also for the crimes of housebreaking, highway-robbery, horse-stealing, and robbing of churches.

By the 18 Eliz. c. 7. it is enacted, that after the offender has been allowed his clergy, and burned in the hand, he shall be enlarged and delivered out of prison; with a proviso, that the judge may, if he think fit, continue the offender in gaol for any time not exceeding a year. And thus the law continued for above a century; except only that the 21 Jac. I. c. 5. allowed that a woman convicted of simple larceny under the value of 10s. should not properly have the benefit of clergy, for they were not called upon to read, but be burned in the hand, and whipped, stocked, or imprisoned for any time not exceeding a year. And a similar indulgence, by the 3 & 4 W. & M. c. 9. and 4 & 5 W. & M. c. 24. was extended to women guilty of any clergyable felony whatsoever; who were allowed once to claim the benefit of the statute, in like manner as men might claim the benefit of clergy, and to be discharged, upon being burned in the hand, and imprisoned for any time not exceeding a year.

By 4 Geo. I. c. 11. and 6 Geo. I. c. 23. when any person shall be convicted of any larceny, either grand or petit, or any felonious stealing or taking of money, or goods and chattels, either from the person or the house of any other, or in any other manner, and who by the law shall be entitled to the benefit of clergy, and liable only to the penalties of burning in the hand or whipping, the court in their discretion, instead of such burning in the hand or whipping, may direct such offenders to be transported for seven years.

Also, by the 19 Geo. III. c. 74. instead of burning in the hand, the court in all clergyable felonies may impose a pecuniary fine; or (except in the case of manslaughter) may order the offender to be once or oftener, but not more than thrice, either publicly or privately whipped;* such private whipping to be inflicted in the presence of two witnesses.

* By the 1 Geo. IV. c. 57. the punishment of public and private whipping of women is abolished, and instead thereof is substituted hard labour in the gaol or house of correction.

In all felonies clergy is allowable, unless taken away by express words of an act of parliament: and where clergy is taken away from the principal, it is not of course taken away from the accessory, unless he be also particularly included in the words of the statute. When the benefit of clergy is taken away from the offender (as in case of murder, buggery, robbery, rape, and burglary), a principal in the second degree, being present, aiding and abetting the crime, is as well excluded from his clergy as he that is principal in the first degree; but that, where it is only taken away from the *person committing* the offence (as in case of stabbing, or committing larceny in a dwelling-house,* or privately from the person), his aiders and abettors are not excluded.

Lastly, we are to inquire what the consequences are to the party of allowing him the benefit of clergy. The consequences are such as affect his present interest, and future credit and capacity; as having been once a felon, but now purged from that guilt by the privilege of clergy.

And we may observe, that by this conviction he forfeits all his goods to the king; which being once vested in the crown, shall not afterwards be restored to the offender: that, after conviction, and till he receives the judgment of the law, by branding or some of its substitutes, or else is pardoned by the king, he is to all intents and purposes a felon, and subject to all the disabilities and other incidents of a felon: that, after burning or its substitute, or pardon, he is discharged for ever of that, and all other felonies before committed, within benefit of clergy, but not of felonies from which such benefit is excluded: that, by the burning or its substitute, or the pardon of it, he is restored to all capacities and credits, and the possession of his lands, as if he had never been convicted: that what is said with regard to the advantages of commoners and laymen, subsequent to the burning in the hand, is equally applicable to all peers and clergymen, although never branded at all, or subjected to other punishment in its stead. For they have the same privileges without any burning, or any substitute for it, which others are entitled to after it.

JUDGMENT.

When, upon a capital charge, the jury have brought in their verdict Guilty, the prisoner either is immediately, or at a convenient time after, asked, if he has any thing to offer why judgment should not be awarded against him: after which the court pronounces sentence. Of these some are capital, and consist generally in being hanged. Some in exile or banishment, or transportation: others, in loss of liberty. Some extend to confiscation, by forfeiture of land, or moveables, or both, or of the profits of lands for life: others induce a disability of holding offices or employment, being heirs, executors, and the like. Some are

* In the case of all capital larcenies in a dwelling-house the benefit of clergy has been taken away, as well from those who aid, assist, and abet, as from those who actually commit the crime, by 3 W. & M. c. 9. and 12 Ann. st. 1. c. 7.

merely pecuniary, by stated or discretionary fines. And, lastly, there are others, that consist principally in their ignominy, though most of them are mixed with some degree of corporal pain; such as whipping, hard labour in the house of correction or otherwise, the pillory,* the stocks, and the ducking-stool.

By the 3 Geo. IV. c. 114. whenever any person shall be convicted of any of the offences hereafter specified and set forth; (that is to say)—any assault with intent to commit felony; any attempt to commit felony; any riot; any misdemeanor for having received stolen goods, knowing them to have been stolen; any assault upon a peace officer, or upon an officer of the customs or excise, or upon any other officer of the revenue, in the due discharge of their respective duties, or upon any person or persons acting in aid of any such officer or officers; any assault committed in pursuance of any conspiracy to raise the rate of wages; being an utterer of counterfeit money, knowing the same to be counterfeit; knowingly and designedly obtaining money, goods, wares, or merchandizes, bills, bonds, or other securities for money, by false pretences, with intent to cheat any person of the same; keeping a common gaming-house, a common bawdy-house, or a common ill-governed and disorderly house; wilful and corrupt perjury, or of subornation of perjury; having entered any open or inclosed ground with intent there illegally to destroy, take, or kill game or rabbits, or with intent to aid, abet, and assist any person or persons illegally to destroy, take, or kill game or rabbits, and having been there found at night armed with any offensive weapon; in each and every of the above cases, the court before which any such offender shall be convicted, may award and order (if such court shall think fit) sentence of imprisonment with hard labour, for any term not exceeding the term for which such court may now imprison for such offences, either in addition to or in lieu of any other punishment which may be inflicted on any such offenders by any law in force before the passing of this act.

By the 4 Geo. IV. c. 48. whenever any person shall be convicted of any felony, except murder, and shall by law be excluded the benefit of clergy in respect thereof, and the court before which such offender shall be convicted shall be of opinion, that, under the particular circumstances of the case, such offender is a fit and proper subject to be recommended to the royal mercy, it shall be lawful for such court, if it shall think fit, to direct the proper officer to inquire and ask, if such offender hath any thing to say, why judgment of death should not be recorded against him; and in case such offender shall not allege any matter or thing sufficient to arrest such judgment, the court may abstain from pronouncing judgment of death, and, instead of pronouncing such judgment, order the same to be entered of record; and thereupon such officer shall enter judgment of death on record against such offender in the usual and accustomed form, and in such and the same manner

* By the 56 Geo. III. c. 138. the punishment of the pillory is abolished in all cases, except for wilful and corrupt perjury, and subornation of perjury. See p. 177, Note.

as is now used, and as if judgment of death had actually been pronounced in open court against such offender. § 1.

Nothing herein contained shall extend to Scotland.

ATTAINDER.

When sentence of death is pronounced, the inseparable consequence is *attainder*. The prisoner is then called *attaint*, *attinctus*, stained or blackened. He is no longer of any credit or reputation; he cannot be a witness in any court; neither is he capable of performing the functions of another man. This is *after judgment*; for there is a great difference between a man *convicted* and *attainted*, though they are frequently confounded together. After conviction only, a man is liable to none of these disabilities; for there is still in contemplation of law a possibility of his innocence. Something may be offered in arrest of judgment; the indictment may be erroneous; he may obtain a pardon, or be allowed the benefit of clergy. But when judgment is once pronounced, both law and fact conspire to prove him completely guilty. Upon judgment, therefore, of death, and not before, the attainder of a criminal commences; or upon such circumstances as are equivalent to judgment of death; as judgment of outlawry on a capital crime pronounced for absconding or fleeing from justice, which tacitly confesses the guilt.

The consequences of attainder are forfeiture and corruption of blood.

FORFEITURE.

Forfeiture is two-fold; of real, and personal estates. First, as to real estates; by attainder in high treason, a man forfeits to the king all his lands and tenements of inheritance, whether fee-simple or fee-tail, and all his rights of entry on lands or tenements, which he had at the time of the offence committed, or at any time afterwards, to be for ever vested in the crown; and also the profits of all lands and tenements, which he had in his own right for life or years, so long as such interest shall subsist. This forfeiture relates backwards to the time of the treason committed, so as to void all intermediate sales and incumbrances, but not those before the fact; and therefore a wife's jointure is not forfeitable for the treason of her husband, because settled upon her previous to the treason committed. But her dower is forfeited by the express provision of the 5 & 6 Edw. VI. c. 11. And yet the husband shall be tenant by the curtesy of the wife's lands, if the wife be attainted of treason; for that is not prohibited by the statute. But though, after attainder, the forfeiture relates back to the time of the treason committed, yet it does not take effect unless an attainder be had, of which it is one of the fruits; and therefore, if a traitor die before judgment pronounced, or be killed in open rebellion, or be hanged by martial law, it works no forfeiture of his lands, for he never was attainted of treason.

In petit treason and felony the offender also forfeits all his chattel interests absolutely, and the profits of all estates of free-

hold during life; and after his death, all his lands and tenements in fee-simple (but not those in tail) to the crown for a very short period of time; for the king shall have them for a year and a day, and may commit therein what waste he pleases; which is called the king's *year, day, and waste*.

The forfeiture of goods and chattels accrues in every one of the higher kinds of offence; in high treason or misprision thereof; petit treason, felonies of all sorts, whether clergyable or not, self-murder or *felo de se*, petit larceny, and standing mute. For *flight* also, on an accusation of treason, felony, or even petit larceny, whether the party be found guilty or acquitted, if the jury find the flight, the party shall forfeit his goods and chattels.

CORRUPTION OF BLOOD.

Another immediate consequence of attainder is the *corruption of blood*, both upwards and downwards; so that an attainted person can neither inherit lands or other hereditaments from his ancestors, nor retain those he is already in possession of, nor transmit them by descent to any heir; but the same shall escheat to the lord of the fee, subject to the king's superior right of forfeiture; and the person attainted shall also obstruct all descents to his posterity, wherever they are obliged to derive a title through him to a remoter ancestor.

REVERSAL OF JUDGMENT.

A judgment may be falsified, reversed, or avoided, in the first place, *without a writ of error*, for matters foreign to or *dehors* the record, that is, not apparent upon the face of it; so that they cannot be assigned for error in the superior court, which can only judge from what appears in the record itself; and therefore, if the whole record be not certified, or not truly certified by the inferior court, the party injured thereby (in both civil and criminal cases) may allege a *diminution* of the record, and cause it to be rectified.

Thus, if any judgment whatever be given by persons who had no good commission to proceed against the person condemned, it is void, and may be falsified by shewing the special matter, without writ of error. As, where a commission issues to A and B and twelve others, or any two of them of which A or B shall be one, to take and try indictments; and any of the other twelve proceed without the interposition or presence of either A or B; in this case, all proceedings, trials, convictions, and judgments, are void for want of a proper authority in the commissioners, and may be falsified upon bare inspection; without the trouble of a writ of error.

So, likewise, if a man purchase land of another, and afterwards the vendor is, either by outlawry or his own confession, convicted and attainted of treason or felony, previous to the sale or alienation, whereby such land becomes liable to forfeiture or escheat, upon any trial, the purchaser is at liberty, without bringing any writ of error, to falsify, not only the time of the felony or treason supposed, but the very felony or treason itself, and is not concluded by the confession or the outlawry of the vendor, though the vendor him-

self is concluded, and not suffered now to deny the fact which he has by confession or flight acknowledged. But if such attainer of the vendor be by verdict on the oath of his peers, the alienee cannot be received to falsify or contradict the *fact* of the crime committed, though he is at liberty to prove a mistake in *time*, or that the offence was committed after the alienation, and not before.

WRIT OF ERROR.

A judgment may be reversed by *writ of error*, which lies from all inferior criminal jurisdictions to the Court of King's Bench, and from the King's Bench to the House of Lords. As, where a man is found guilty of perjury, and receives the judgment of felony; or for other less palpable errors, such as irregularity, omission, or want of form in the process of outlawry, or proclamations; the want of a proper *addition* to the defendant's name, according to the Statute of Additions; for not properly naming the sheriff or other officer of the court, or not duly describing where his county court was held; for laying an offence committed in the time of the late king to be done against the peace of the present; and for many other similar causes. These writs of error, to reverse judgments in cases of misdemeanors, are not to be allowed of course, but on sufficient cause shewn to the attorney-general; and then they are grantable of common right. But writs of error to reverse attainders in capital cases are only allowed *ex gratiâ*: and not without express warrant under the king's sign manual, or at least by the consent of the attorney-general.

The effect of falsifying or reversing an outlawry is, that the party shall be in the same plight as if he had appeared upon the *capias*; and if it be before plea pleaded, he shall be put to plead to the indictment; if after conviction, he shall receive the sentence of the law: for all the other proceedings, except only the process of outlawry for his non-appearance, remain good and effectual as before. But when judgment pronounced upon conviction is falsified or reversed, all former proceedings are absolutely set aside, and the party stands as if he had never been at all accused.

REPRIEVE.

A reprieve is the withdrawing of a sentence for an interval of time, whereby the execution is suspended. This may be either before or after judgment: as where the judge is not satisfied with the verdict, or the evidence is suspicious, or the indictment is insufficient, or he is doubtful whether the offence be within clergy; or sometimes, if it be a small felony, or any favourable circumstances appear in the criminal's character, in order to give room to apply to the crown for either an absolute or conditional pardon.

Reprieves may also be *ex necessitate legis*: as, where a woman is capitally convicted, and pleads her pregnancy. In case this plea be made in stay of execution, the judge must direct a jury of

twelve matrons or discreet women to inquire the fact; and if they bring in their verdict *quick with child* (for barely *with child*, unless it be alive in the womb, is not sufficient), execution shall be staid generally till the next session; and so from session to session, till either she be delivered, or prove by the course of nature not to have been with child at all. But if she once have had the benefit of this reprieve, and been delivered, and afterwards become pregnant again, she shall not be entitled to the benefit of a farther respite for that cause.

Another cause of regular reprieve is, if the offender become *non compos* between the judgment and the award of execution; for though a man be *compos* when he commits a capital crime, yet if he become *non compos* after, he shall not be indicted, if after indictment, he shall not be convicted; if after conviction, he shall not receive judgment; if after judgment, he shall not be ordered for execution. It is therefore an invariable rule, when any time intervenes between the attainder and the award of execution, to demand of the prisoner what he hath to allege, why execution should not be awarded against him; and if he appear to be insane, the judge in his discretion may and ought to reprieve him. Or, the party may plead in bar of the execution; which plea may be either pregnancy, the king's pardon, an act of grace, or diversity of person, *vis.* that he is not the same as was attainted, and the like. In this last case, a jury shall be impannelled to try this collateral issue, namely, the identity of the person. And in these collateral issues the trial shall be *instante*, and no time allowed the prisoner to make his defence or produce his witnesses, unless he will make oath that he is not the person attainted; neither shall any peremptory challenges of the jury be allowed the prisoner.

By the 39 & 40 GEO. III. c. 94. it is enacted, that in all trials for treason, murder, and felony, if evidence is produced that the prisoner was insane, and he is acquitted, the jury shall be required to find specially, whether he was insane at the commission of the crime, and to declare that he was acquitted on that account: and if they so find, the court shall order the prisoner to be confined in such place and manner as it shall think fit, till his majesty gives further orders with respect to the custody of the lunatic.

The same may be done with prisoners found insane upon arraignment, or brought before the court for prosecution.

And where insane persons manifest a purpose of committing some indictable crime, they may be committed by one justice, and shall not be bailed out but by the same together with another, or by the sessions, one of the judges, or the chancellor.

Where there is reason to apprehend danger to his majesty's person from the intrusion of any lunatic, and this appears upon his examination before the privy-council or one of the secretaries of state, the chancellor may issue a commission of lunacy to inquire whether such person is insane, and whether danger may be apprehended to his majesty's person; and if a jury so find, the chancellor may take order for the safe custody of the lunatic as long as there is reason to apprehend such danger.

PARDON.

The king may pardon all offences merely against the crown or the public; excepting that, to preserve the liberty of the subject, the committing any man to prison out of the realm is, by the *Habeas Corpus* act, 31 Car. II. c. 2. made a *præmunire*, unpardonable even by the king. The king cannot pardon where private justice is principally concerned in the prosecution of offenders. Therefore, in appeals of all kinds (which are at the suit, not of the king, but of the party injured) the prosecutor may release, but the king cannot pardon. Neither can he pardon a common nuisance, while it remains unredressed, or so as to prevent an abatement of it; though afterwards he may remit the fine. Neither can he pardon an offence against a popular or penal statute, after information brought; for the informer hath thereby acquired a private property in his part of the penalty.

A pardon must be under the great seal. A warrant under the privy seal, or sign manual, though it may be a sufficient authority to admit the party to bail, in order to plead the king's pardon, when obtained in proper form, is not of itself a complete irrevocable pardon.

It is a general rule, that wherever it may reasonably be presumed the king is deceived; the pardon is void. Therefore any suppression of truth, or suggestion of falsehood, in a charter of pardon, will vitiate the whole.

General words have also a very imperfect effect in pardons. A pardon of all felonies will not pardon a conviction or attainder of felony, but the conviction or attainder must be particularly mentioned; and a pardon of felonies will not include piracy.

By the 13 Ric. II. st. 2. c. 1. it is enacted, that no pardon for treason, murder, or rape, shall be allowed, unless the offence be particularly specified therein; and particularly in murder, it shall be expressed, whether it was committed by lying in wait, assault, or malice prepense.

A pardon may also be conditional; that is, the king may extend his mercy upon what terms he pleases: this is daily exerted in the pardon of felons, on condition of being confined to hard labour for a stated time, or of transportation to some foreign country for life, or for a term of years.

A pardon by act of parliament is more beneficial than by the king's charter; for a man is not bound to plead it, but the court must *ex officio* take notice of it; neither can he lose the benefit of it by his own laches or negligence, as he may of the king's charter of pardon. The king's charter of pardon must be specially pleaded, and that at a proper time; for if a man be indicted, and have a pardon in his pocket, and afterwards put himself upon his trial by pleading the general issue, he has waived the benefit of such pardon. But if a man avail himself thereof as soon as by course of law he may, a pardon may either be pleaded upon arraignment,

or in arrest of judgment, or in the present state of proceedings in bar of execution.

A pardon makes the offender a new man; and acquits him of all corporal penalties and forfeitures annexed to the offence for which he obtains his pardon.

But nothing can restore or purify the blood when once corrupted, if the pardon be not allowed till after attainder, but an act of parliament. Yet if a person attainted receive the king's pardon, and afterwards have a son, that son may be heir to his father, because the father being made a new man might transmit new inheritable blood, though, had he been born before the pardon, he could never have inherited at all.

EXECUTION.

Execution in all cases, as well capital as otherwise, must be performed by the legal officer, the sheriff or his deputy. The usage is, for the judge to sign the calendar, or list of all the prisoners' names, with their separate judgments in the margin, which is left to the sheriff. As, for a capital felony, it is written opposite to the prisoner's name, "Let him be hanged by the neck." Which is the only warrant that the sheriff has.

The sheriff, upon receipt of his warrant, is to do execution within a convenient time. In London more exactness is used both as to the warrant and the time of executing it. In the Court of King's Bench, if the prisoner be tried at the bar, or brought there by *habeas corpus*, a rule is made for his execution; either specifying the time and place, or leaving it to the discretion of the sheriff. And throughout the kingdom, by 25 Geo. II. c. 37. it is enacted, that in case of murder the judge shall, in his sentence, direct execution to be performed on the next day but one after sentence past.

The sheriff cannot alter the manner of the execution, by substituting one death for another, without being guilty of felony himself. It is held, that even the king cannot change the punishment of the law, by altering the hanging or burning into beheading; though when beheading is part of the sentence, the king may remit the rest.

If, upon judgment to be hanged, the criminal be not thoroughly killed, but revives, the sheriff must hang him again; for the former hanging was no execution of the sentence.

BOOK III.**OF THE RIGHTS OF PERSONS.****CHAPTER I.***Of the Parliament.*

HAVING, in the course of this work, treated of civil injuries and their remedies, and also of public offences with their punishments, we now come to the consideration of the **RIGHTS OF PERSONS**, considered either as individuals or as public bodies; and shall first treat of the Parliament.

This body is regularly summoned by the king's writ or letter, issued out of Chancery, at least forty days before it begins to sit. It is a branch of the royal prerogative, that no parliament can be convened by its own authority, or by the authority of any except the king alone.

The constituent parts of parliament are the king, the House of Lords, and the House of Commons.

The **HOUSE OF LORDS** consists of the Lords Spiritual and Lords Temporal.

The Lords Spiritual are the two archbishops, and twenty-four bishops. Since the Union with Ireland, four lords spiritual are also sent from that kingdom. All these hold, or are supposed to hold, certain ancient baronies under the king. But though the lords spiritual are, in the eye of the law, a distinct estate from the lords temporal, and are so distinguished in most acts of parliament, yet in practice they are usually blended together under the one name of *the lords*.

The Lords Temporal consist of all the peers of the realm, by whatever title of nobility distinguished; dukes, marquesses, earls, viscounts, or barons. Some of these sit by descent, as do all ancient peers; some by creation, as do all new-made ones; others, since the Union with Scotland, by election, which is the case of the sixteen peers who represent the Scots nobility; and twenty-eight from Ireland, who represent the Irish nobility.

The **HOUSE OF COMMONS** consists of the representatives of the people; whereof England returns 513 members; Scotland, 45 members; and Ireland, 100 members.

The *power* and *jurisdiction* of parliament, says Blackstone, is so transcendant and absolute, that it cannot be confined within any bounds. It hath sovereign and uncontrollable authority in the making, confirming, enlarging, restraining, abrogating, repealing, reviving, and expounding of laws, concerning matters of all possible denominations, ecclesiastical or temporal, civil, military, maritime, or criminal. All mischiefs and grievances, operations, and remedies, that transcend the ordinary course of the laws, are within the reach of this extraordinary tribunal. It can regulate or new-model the succession to the crown. It can alter the established religion of the land. It can change and create afresh even the constitution of the kingdom and of parliaments themselves. It can, in short, do every thing that is not naturally impossible.

No one can sit or vote in either house, unless he be twenty-one years of age. This is expressly declared by 7 & 8 W. III. c. 25. with regard to the House of Commons; doubts having arisen from some contradictory adjudications, whether or not a minor was incapacitated from sitting in that house.

By 7 Jac. I. c. 6. it is enacted, that no member be permitted to enter into the House of Commons till he hath taken the oaths of allegiance before the lord steward or his deputy; and by 30 Car. II. c. 20. and 1 Geo. I. c. 13. that no member shall vote or sit in either house, till he hath in the presence of the house taken the oath of allegiance, supremacy, and abjuration, and subscribed and repeated the declaration against transubstantiation, and invocation of saints, and the sacrifice of the mass.

It is also enacted, by 12 & 18 W. III. c. 2. that no alien, even though he be naturalized, shall be capable of being a member of either house of parliament.

The *privileges* of parliament are, privilege of speech, of person, &c. As to privilege of speech, it is declared by the 1 W. & M. st. 2. c. 2. as one of the liberties of the people, "that the freedom of speech and debate, and proceedings in parliament, ought not to be impeached or questioned in any court or place out of parliament." To assault a member of either house, or his menial servant, is a high contempt of parliament, and there punished with the utmost severity. It has likewise peculiar penalties annexed to it in the courts of law, by the 5 Hen. IV. c. 6. and 11 Hen. VI. c. 11. No member of either house can be arrested and taken into custody, unless for some indiotable offence, without a breach of the privilege of parliament.

But all other privileges which derogate from the common law in matters of civil right are now at an end, save only as to the freedom of the member's person; which in a peer (by the privilege of peerage) is for ever sacred and inviolable, and in a commoner (by the privilege of parliament) for forty days after every prorogation, and forty days before the next appointed meeting; which is in effect as long as the parliament subsists, it seldom being prorogued for more than fourscore days at a time. As to all other privileges, which obstruct the ordinary course of

justice, they were restrained by the 12 W. III. c. 3; 2 & 3 Ann. c. 18. and 11 Geo. II. c. 24. and are now totally abolished by 10 Geo. III. c. 50. which enacts, that any suit may at any time be brought against any peer or member of parliament, their servants, or any other person entitled to privilege of parliament; which shall not be impeached or delayed by pretence of any such privilege, except that the person of a member of the House of Commons shall not thereby be subjected to any arrest or imprisonment.

Likewise, for the benefit of commerce, it is provided by 4 Geo. III. c. 33. that any trader, having privilege of parliament, may be served with legal process for any just debt to the amount of 100*l*. and unless he make satisfaction within two months, it shall be deemed an act of bankruptcy; and that commissions of bankrupt may be issued against such privileged traders, in like manner as against any other.

The claim of privilege hath been usually guarded with an exception as to the case of indictable crimes, or, as it hath been frequently expressed, of treason, felony, and breach of the peace. Whereby it seems to have been understood, that no privilege was allowable to the members, their families, or servants, in any crime whatsoever. And to which may be added, that a few years ago the case of writing and publishing seditious libels was resolved by both houses not to be entitled to privilege. So that the chief, if not the only privilege of parliament, in such cases, is the right of receiving immediate information of the imprisonment or detention of any member, with the reason for which he is detained.

These are the general heads of the laws and customs relating to parliament, considered as an aggregate body. We will next proceed to the laws and customs relating to the House of Lords in particular.

HOUSE OF LORDS.

One very ancient privilege is that declared by the Charter of the Forest, confirmed in parliament, 9 Hen. III.; *viz.* that every lord spiritual or temporal summoned to parliament, and passing through the king's forests, may, both in going and returning, kill one or two of the king's deer, without warrant, in view of the forester if he be present, or on blowing a horn if he be absent, that he may not seem to take the king's venison by stealth.

In the next place, they have a right to be attended by the judges of the Court of King's Bench and Common Pleas, and such of the barons of the Exchequer as are of the degree of the coif, or have been made serjeants at law; as likewise by the king's learned counsel, being serjeants, and by the masters of the Court of Chancery, for their advice in points of law, and for the greater dignity of their proceedings.

Another privilege is, that every peer, by licence obtained from the king, may make another lord of parliament his proxy, to vote

for him in his absence; a privilege which a member of the House of Commons can by no means have, as he is himself but a proxy for his constituents.

Each peer has also a right, by leave of the house, when a vote passes contrary to his sentiments, to enter his dissent on the journals of the house, with the reasons for such dissent; which is usually styled his protest.

All bills, likewise, that may in their consequences any way affect the right of the peerage are, by the custom of parliament, to have their first rise and beginning in the House of Peers, and to suffer no changes or amendments in the House of Commons.

There is also one statute peculiarly relative to the House of Lords, 6 Ann. c. 23. which regulates the election of the sixteen representative peers of North Britain in consequence of the twenty-second and twenty-third articles of the Union; and for that purpose prescribes the oaths, &c. to be taken by the electors; directs the mode of balloting; prohibits the peers electing from being attended in an unusual manner; and expressly provides, that no other matter shall be treated of in that assembly, save only the election, on pain of incurring a *præmunire*.

HOUSE OF COMMONS.

The peculiar laws and customs of the House of Commons relate principally to the raising of taxes, and the election of members to serve in parliament.

First, with regard to *taxes*; it is the ancient indisputable privilege and right of the house of commons, that all grants of subsidies, or parliamentary aids, do begin in their house, and are first bestowed by them; although their grants are not effectual to all intents and purposes, until they have the assent of the other two branches of the legislature.

Elections.—With regard to the elections of knights, citizens, and burgesses, the laws have very strictly guarded against usurpation or abuse of the power of election, by many salutary provisions which may be reduced to three points; the qualifications of the electors, the qualifications of the elected, and the proceedings at elections.

As to the *qualifications of electors*: and, first, those of electors for knights of the shire. By 8 Hen. VI. c. 7. and 10 Hen. VI. c. 2. (amended by 14 Geo. III. c. 58.) the knights of the shire shall be chosen of people whereof every man shall have freehold to the value of forty shillings by the year within the county; which, by subsequent statutes, is to be clear of all charges and deductions, except parliamentary and parochial taxes. The voter's evidence of the value must be received at the poll; but it is not conclusive, and may be contradicted by other evidence, upon a scrutiny, or before a committee. The 7 & 8 W. III. c. 25. expressly declares, that public taxes are not to be deemed charges payable out of the estate; and therefore one would think, that the plain and obvious construction would be, that wherever a free-

holder has an estate which would yield him 40*s.* before these taxes are paid, or for which he would receive a rent of 40*s.* if he paid the taxes himself, he would have a right to vote. Yet a committee has decided, that when a tenant paid a rent less than 40*s.* but paid parochial taxes, which added to the rent amounted to more than 40*s.* the landlord had no right to vote. 2 *Lud.* 475.

The other less important qualifications of the electors are, that no person under twenty-one shall be capable of voting; nor any person guilty of perjury, or subornation of perjury.

No person shall vote in right of any freehold granted to him, fraudulently to qualify him to vote. Fraudulent grants are such as contain an agreement to re-convey, or to defeat the estate granted; which agreements are made void, and the estate is absolutely vested in the person to whom it is so granted. And, to guard the better against such frauds, it is further provided, that every voter shall have been in the actual possession or receipt of the profits of his freehold to his own use for twelve calendar months before; except it came to him by descent, marriage settlement, will, or promotion to a benefice or office.

No person shall vote in respect of any annuity or rent-charge, unless registered with the clerk of the peace twelve calendar months. In mortgaged or trust estates, the person in possession, under the above-mentioned restrictions, shall have the vote. Only one person shall be admitted to vote for any one house or tenement, to prevent the splitting of freeholds.

No estate shall qualify a voter, unless the estate has been assessed to the land-tax six months before the election, either in the name of the voter or his tenant; but if he have acquired it by marriage, descent, or other operation of law, it must have been assessed to the land-tax two years before the election, either in the name of the predecessor or person through whom the voter derives his title, or in the name of the tenant of such person.

No tenant by copy of court-roll shall be permitted to vote as a freeholder. And no person employed in managing or collecting the duties of excise, customs, stamps, salt, windows or houses, or the revenue of the post-office, shall vote at any election, under the penalty of 100*l.*

By 3 Geo. III. c. 15. no freeman of any city or borough (other than such as claim by birth, marriage, or servitude) shall be entitled to vote therein, unless he hath been admitted to his freedom twelve calendar months before.

Qualification of Members.—Members of parliament must not be aliens or minors; they must not be any of the twelve judges; nor of the clergy; nor persons attainted of treason or felony. Sheriffs of counties, and mayors and bailiffs of boroughs, are not eligible in their respective jurisdictions, as being returning officers; but the sheriffs of one county are eligible to be knights of another.

No person concerned in the management of any duties or taxes created since 1692, except the commissioners of the treasury; nor any of the officers following—*viz.* commissioners of

prizes, transports, sick and wounded; wine licences, navy, and victualling; secretaries or receivers of prizes; comptrollers of the army accounts; agents for regiments; governors of plantations, and their deputies; officers of Minorca or Gibraltar; officers of the excise and customs; clerks or deputies in the several offices of the treasury, exchequer, navy, victualling, admiralty, pay of the army or navy, secretaries of state, salt, stamps, appeals, wine licences, hackney-coaches, hawkers and pedlars; nor any persons that hold any new office under the crown, created since 1705, are capable of being elected or sitting as members.

No person having a pension under the crown during pleasure, or for any term of years, is capable of being elected; and if any member accept an office under the crown, except an officer in the army or navy accepting a new commission, his seat is void; but such member is capable of being re-elected. Every knight of a shire shall have a clear estate of freehold or copyhold to the value of six hundred pounds per annum, and every citizen and burgess to the value of three hundred pounds, except the eldest sons of peers, and of persons qualified to be knights of shires, and except the members for the two universities: and of this qualification the member must make oath, and give in the particulars in writing, at the time of his taking his seat. By the 59 Geo. III. c. 37. the estate to qualify a member of the House of Commons may lie in any part of the United Kingdom.

By 22 Geo. III. c. 45. no contractor with the officers of government or with any other person for the service of the public, shall be capable of being elected, or of sitting in the house, as long as he holds any such contract, or derives any benefit from it. But this does not extend to contracts with corporations, or with companies, which then consisted of ten partners, or to any person to whom the interest of such a contract shall accrue by marriage or operation of law for the first twelve months. And if any person disqualified by such a contract shall sit in the house, he shall forfeit 500*l.* for every day; and if any person who engages in a contract with government admits any member of parliament to a share of it, he shall forfeit 500*l.* to the prosecutor.

At the union of Great Britain and Ireland, it was enacted by the 41 Geo. III. c. 52. that all persons disabled from sitting in the British parliament shall also be disabled from sitting in the parliament of the United Kingdom as members for any county, stewartry, city, borough, cinque port, town, or place, in that part of the United Kingdom called Great Britain. § 1.

And all persons disabled from sitting in the House of Commons of Ireland shall also be disabled from sitting in the House of Commons of the United Kingdom, for any county, city, borough, town, or place, in that part of the United Kingdom called Ireland. § 2.

But nothing in this act shall be construed to enable persons disqualified from sitting in the House of Commons of Great Britain to sit for any place in Ireland, nor *à contra* to enable any person

disqualified from sitting in the House of Commons of Ireland to sit in the House of Commons of the United Kingdom for any place in Great Britain. § 3.

And by section 4, persons holding the following offices in that part of the United Kingdom called Ireland, are disqualified from sitting as members of the House of Commons of the United Kingdom—*viz.* commissioners of the customs, excise, and stamps; or any person concerned, directly or indirectly, in the framing, collecting, or managing any sums of money, duties, or aids granted by parliament to his majesty, except the commissioners of the treasury or their secretary; commissioners of appeal concerning the duties of customs, excise, or stamps, or for controuling or auditing the account of the said duties, except the auditor of the exchequer; commissioners of imprest accounts; army agents; contractors, except persons who shall be members of any incorporated company *now existing*, and consisting of more than ten persons, so far as relates to any contract by the said company; deputies or clerks in the following offices, *viz.* the treasurer, the auditor or the tellers of the exchequer, the chancellor of the exchequer, except the secretary, the commissioners of stamps, the commissioners of appeal.

And no person holding any place under the lord lieutenant of Ireland, created since the Irish act, 23 Geo. III. c. 41. shall be capable of sitting in the House of Commons of the United Kingdom.

In order to remove doubts respecting the eligibility of persons in holy orders to sit in the House of Commons, it is enacted by the 41 Geo. III. c. 53. § 1, 2. that no person having been ordained to the office of priest or deacon, or being a minister of the church of Scotland, shall be capable of sitting in the House of Commons; and if any person, after his election, shall be ordained to the office of priest or deacon, &c. his seat is immediately void. And if any person in any of the aforesaid cases shall presume to sit or vote, he is subject to the penalty of 500*l.* for every day he so sits or votes, besides being from thenceforth incapable of taking, holding, or enjoying any benefice, living, or ecclesiastical promotion; or of taking, holding, or enjoying any office under the crown.

Prosecutions must be commenced within twelve months. § 3.

And celebration of divine service according to the rites of the church of England, or of the church of Scotland, in any church or chapel set apart for public worship, is declared to be *prima facie* evidence of such person being ordained to the office of priest or deacon. § 4.

Mode of Election.—As soon as the parliament is summoned by the king's proclamation, the lord chancellor sends his warrant to the clerk of the crown in chancery; who thereupon issues out writs to the sheriff of every county, for the election of all the members to serve for that county, and every city and borough therein. Within three days after the sheriff is to send his precept, under his seal, to the returning officers of the cities and boroughs in his jurisdiction; and the said returning officers are to proceed to election within

eight days from the receipt of the precept, giving four days notice of the same; and to return the persons chosen, together with the precept, to the sheriff.

But elections of knights of the shire must be proceeded to by the sheriffs themselves in person, at the next county court that shall happen after the delivery of the writ. And by 25 Geo. III. c. 84. in every county the sheriff, having indorsed on the back of the writ the day on which he receives it, shall, within two days after the receipt thereof, cause proclamation to be made at the place where the ensuing election ought by law to be held, of a special county court to be there held, for the purpose of such election only, on any day (Sunday excepted), not later from the day of making such proclamation than the 16th day, nor sooner than the 10th; and that he shall proceed in such election at such special county court, in the same manner as if the said election had been held at a county court, or at an adjourned county court, according to the former laws. And, by the 33 Geo. III. c. 64. the proclamation must be made at the usual place, between the hours of eight in the morning and four in the afternoon from October 25 to March 25, and the rest of the year between eight and six.

As soon as the time and place of election are fixed, all soldiers are to remove, at least one day before the election, to the distance of two miles or more, and not return till one day after the toll is ended.

No lord of parliament, or lord-lieutenant of a county, are to interfere in the election; and the lord warden of the cinque ports shall not recommend any members there.

If any officer of the excise, customs, stamps, or certain other branches of the revenue, presume to intermeddle in elections, by persuading any voter or dissuading him, he forfeits 100*l.* and is disabled to hold any office.

No candidate shall, after the date (usually called the *teste*) of the writs, or after the vacancy, give any money or entertainment to the electors, or promise to give any, either to particular persons, or to the place in general, on pain of being incapable to serve for that place. And if any money, gift, office, employment, or reward, be given or promised to any voter, in order to influence him to give or withhold his vote, as well he that takes as he that offers, forfeits 500*l.* and is for ever disabled from voting, or holding any office in any corporation; unless, before conviction, he discover some other offender of the same kind, and then he is indemnified.

The sheriff, or other returning officer, is to take an oath against bribery, and for the due execution of his office. The candidates likewise, if required, must swear to their qualification, and the electors in counties to their's; and the electors, both in counties and boroughs, are also compellable to take the oath of abjuration, and that against bribery and corruption.

The election being closed, the returning officer in boroughs returns his precept to the sheriff with the persons elected; and the sheriff returns the whole, together with the writ for the county, and

the knights elected thereupon, to the clerk of the crown before the day of meeting, if it be a new parliament, or within fourteen days after the election, if it be an occasional vacancy; and this under penalty of 500*l*. If the sheriff do not return such knights only as are duly elected, he forfeits 100*l*.; and the returning officer in boroughs, for a like false return, 40*l*.; and they are, besides, liable to an action: and any person bribing the returning officer forfeits 300*l*. But the members returned by him are the sitting members, until the House of Commons, upon petition, shall adjudge the return to be illegal.

Method of doing Business.—We proceed now to the method of making laws. The speaker of the House of Lords is the lord chancellor, or keeper of the great seal. The speaker of the House of Commons is chosen by the house, but must be approved by the king.

To bring a bill into the house, if the relief sought by it be of a private nature, it is first necessary to prefer a petition. This petition (where founded on facts that may be in their nature disputed) is referred to a committee; and then (or otherwise upon the mere petition) leave is given to bring in the bill. In public matters, the bill is brought in upon motion, without any petition at all.

The persons directed to bring in the bill present it to the house, drawn out on paper, with a multitude of blanks, or void spaces, where any thing occurs that is dubious, or necessary to be settled by the house itself. In the House of Lords, if the bill begin there, it is (when of a private nature) referred to two of the judges, to examine and report the state of the facts alleged, to see that all necessary parties consent, and to settle all points of technical propriety. This is read a first time; and at a convenient distance a second time; and after each reading the speaker opens to the house the substance of the bill, and puts the question, whether it shall proceed any farther?

After the second reading it is committed, that is, referred to a committee, either private or of the whole house. A committee of the whole house is composed of every member; and, to form it, the speaker quits the chair, (another member being appointed chairman,) and may sit and debate as a private member. In these committees the bill is debated clause by clause, amendments made, the blanks filled up, and sometimes the bill entirely new-modelled. After it has gone through the committee, the chairman reports it to the house with the amendments. When the house hath agreed or disagreed to the amendments, the bill is then ordered to be engrossed. When this is finished, it is read a third time, and amendments are sometimes then made; and if a new clause be added, it is done by tacking a separate piece of parchment to the bill, which is called a *ryder*. The speaker then again opens the contents; and, holding it up in his hands, puts the question, whether the bill shall pass? If this is agreed to, the title to it is then settled. After this, one of the members is directed to carry it to the lords, and desire their concurrence; who, attended by

several more, carries it to the bar of the House of Peers, and there delivers it to their speaker.

It there passes through the same forms as in the other house; and, if rejected, no more notice is taken. But if it be agreed to, the lords send a message by two masters in chancery (or, upon matters of high dignity or importance, by two of the judges) that they have agreed to the same; and the bill remains with the lords, if they have made no amendment to it. But if any amendments be made, such amendments are sent down with the bill to receive the concurrence of the commons. If the commons disagree to the amendments, a conference usually follows; and if both houses remain inflexible, the bill is dropped. If the commons agree to the amendments, the bill is sent back to the lords by one of the members. The same forms are observed, *mutatis mutandis*, when the bill begins in the House of Lords. But when an act of grace or pardon is passed, it is first signed by his majesty, and then read once only in each of the houses, without any new engrossing or amendment. And when both houses have done with any bill, it is always deposited in the house of peers, to wait the royal assent; except in the case of a bill of supply, which, after receiving the concurrence of the lords, is sent back to the commons.

Royal Assent.—The royal assent may be given two ways:—First, in person, when the king comes to the house of peers, in his crown and royal robes, and sending for the commons to the bar, the titles of all the bills that have passed both houses are read, and the king's answer is declared by the clerk of the parliament. If the king consent to a public bill, the clerk usually declares, "*Le roi le veut*," "The king wills it so to be;" if to a private bill, "*Soit fait comme il est désiré*," Be it as it is desired." If he refuse his assent, "*Le roi s'avisera*," "The king will advise upon it." When a bill of supply is passed, it is carried up and presented to the king by the speaker of the house of commons; and the royal assent is thus expressed, "*Le roi remercie ses loyal sujets, accepte leur benevolence, et aussi le veut*;" "The king thanks his loyal subjects, accepts their benevolence, and wills it so to be." Secondly, by 33 Hen. VIII. c. 21. the king may give his assent by letters patent under the great seal, signed with his hand. And when the bill has received the royal assent in either of these ways, it is then, and not before, a statute or act of parliament.

By 33 Geo. III. c. 13. the clerk of the parliament shall indorse on every act of parliament, immediately after the title, the day, month, and year, when the same shall have received the royal assent; and such indorsement shall be taken to be a part of such act, and to be the date of its commencement, where no other commencement shall be therein provided.

And by 48 Geo. III. c. 106. where any bill shall be introduced into any session of parliament for the continuance of any act which would expire in such sessions, and such act shall have expired before the bill for continuing the same shall have received the royal assent, such continuing act shall be deemed to have effect

from the date of the expiration of the act intended to be continued, except it shall be otherwise provided in such continuing act: but nothing herein contained shall extend to affect any person with any punishment, penalty, or forfeiture, by reason of any thing done or omitted to be done, contrary to the provisions of the act continued, between the expiration of the same, and the date at which the act continuing the same shall receive the royal assent.

Adjournment, &c.—An *adjournment* is a continuance of the sessions from one day to another.

A *prorogation* is the continuance of the parliament from one session to another.

A *dissolution* is the civil death of the parliament; and this may be effected three ways:—

1. By the king's will, expressed either in person or by representation.

2. Or, by the demise of the crown. By the 7 & 8 W. III. c. 15. and 6 Ann. c. 7. the parliament in being shall continue for six months after the death of any king or queen, unless sooner prorogued or dissolved by the successor; and if the parliament be, at the time of the king's death, separated by adjournment or prorogation, it shall, notwithstanding, assemble immediately; and if no parliament be then in being, the members of the last parliament shall assemble, and be again a parliament.

3. Lastly, a parliament may be dissolved or expire by length of time. The utmost extent of time that the same parliament is allowed to sit is *seven* years.

CHAPTER II.

Of the King.

By the constitution, the supreme executive power of the state is vested, in a single person called the king or queen: and such person whether male or female, is, by the 1 Mar. st. 2. c. 1. invested with all ensigns, rights, and prerogatives of sovereign power.

The right of succession is hereditary; but this right is subject to be changed or limited by parliament: under which limitation the crown still continues hereditary; that is, it is descendible to the next heir male or female. But this hereditary right implies not a divine right; it is unquestionably in the breast of the legislature to defeat this hereditary right, exclude the immediate heir, and to vest the inheritance in any one else: but, however limited and transferred, it still becomes hereditary in the wearer.

THE QUEEN AND ROYAL FAMILY.

The queen of England is either queen regent, queen consort, or

queen dowager, The queen regent, regnant, or sovereign, is she who holds the crown in her own right, and by 1 Mar. st. 3. c. 1. such an one has the same powers, prerogatives, rights, dignities, and duties, as if she had been a king. But the queen consort has less power; she has, however, many privileges above other married women.

The queen consort is a public person, distinct from the king, and, like an unmarried woman, can purchase lands, make leases, and do other acts of ownership. She can also take a grant from her husband, which no other wife can. She may likewise sue and be sued alone. She may also have a separate property in goods as well as lands, and has a right to dispose of them by will. In short, she is, in all legal proceedings, looked upon as a single and not as a married woman.

The queen consort has also some exceptions. She pays no toll; nor is she liable to any amercements in any courts. But in general she is on the same footing with other subjects, being to all intents and purposes the king's subject.

Her person is equally protected with that of the king. By the 25 Edw. III. it is high treason to plot against the queen as against the king himself; and to violate or defile the queen consort amounts to the same crime, as well in the violator, as in the queen herself, if consenting. But the case is different in the husband of a queen regent, who (though her subject, and may be punished for treason committed against her) is not guilty of treason for conjugal infidelity, because his infidelity cannot bastardize the heirs to the crown.

The queen dowager is entitled to most of the privileges as queen consort, except that it is not high treason to conspire her death, or to violate her chastity; the succession to the crown not being thereby endangered. Yet still, for the royal dignity, none can marry a queen dowager without a special licence from the king, on pain of forfeiting his lands and effects. But she, though a foreigner, after the king's death, shall have dower, which no other alien has. If married to a subject, she does not lose her privilege, as do dowager peeresses when married to commoners.

The prince of Wales, or heir apparent to the crown, and also his royal consort, and the princess royal, are also particularly regarded by the laws. For, by 25 Edw. III. to compass or conspire the death of the former, and to violate the chastity of either of the latter, is high treason.

By the *royal family* is understood the younger sons and daughters of the king, and other branches of the royal family not immediately in the line of succession. These have precedence before all peers and officers of state, whether ecclesiastical or temporal. The education of the presumptive heir to the crown is now held to be under the care of the king; and by 12 Geo. III. c. 11. no descendant of the body of king George the Second (other than the issue of princesses married into foreign families) can marry without the king's consent under the great seal, unless

they are twenty-five years old; nor even then, without twelve months' notice being given to the privy council, or if in the course of those twelve months both houses of parliament express their disapprobation of the match. A marriage otherwise entered into will be void, and the minister and all persons present incur the penalties of a *præmunire*.

KING'S COUNCILS.

The king's councils consist of the high court of parliament, the peers of the realm, the judges, and the privy council.

The peers of the realm are by their birth hereditary counsellors of the crown, and may be called together by the king to impart their advice in all matters of importance to the realm, either in time of parliament, or, which has been their principal use, when there is no parliament in being. And every peer has a right at all reasonable times to demand an audience of the king.

The judges are the king's counsellors in matters of law; and by the 13 Edw. III. c. 4. they are expressly required to counsel the king in his business. There are various instances of the exercise of this prerogative; as, in Sir John Fenwick's case; and in the reign of George the First, when it was made a question, whether the education and marriage of the Prince of Wales's children belonged to the king or their father; and still more recently, in the case of admiral Byng, in the reign of George the Second.

But of the king's councils the principal one is the privy council.* The number of members is indefinite, and at the pleasure of the king; but they must be natural-born subjects. They sit during the life of the king who nominates them; subject, however, to removal at his discretion. But by the 6 Ann. c. 7. the privy council, on the demise of the crown, shall continue for six months, unless sooner determined by the successor.

A privy counsellor takes an oath to advise the king without partiality, affection, or dread; to keep his counsel secret; to avoid corruption; to assist the execution of what is there resolved; to withstand all who oppose it; and to do all that a good counsellor ought to do to his sovereign lord. He is empowered to inquire into all offences against government, and commit the offenders to take their trial in some court of law. But the jurisdiction herein of the privy council is only to inquire, and not to punish. And by the 16 Car. I. c. 10. it is declared illegal for them to take cognizance of any matter of property belonging to the subjects of this kingdom. But in plantation or admiralty causes, which arise out of the jurisdiction of this kingdom; and in matters of lunacy and idiocy, though they may eventually involve questions of extensive property, the privy council continues to have cognizance, being the court of appeal in such cases.

The privileges of a privy counsellor are certain protections of his person. By the 3 Hen. VII. c. 14. it is felony in any of the

* That portion of the privy council usually denominated the cabinet, forms no part of the constitution of England.

servants of the king's household to conspire against his life; and by the 12 Ann. c. 16. felony without benefit of clergy, unlawfully to assault, strike, or wound, or attempt to kill him, in the execution of his office.

OF THE DUTIES OF THE KING.

The principal duty of the king is to govern his people according to law; for by 12 & 13 W. III. c. 2. the laws of England are the birthright of the people; and all the kings and queens that shall ascend the throne of this realm ought to administer the government according to the said laws. By the coronation oath also, which by the 1 W. & M. c. 6. is to be administered to every king and queen by one of the archbishops or bishops, in the presence of all the people, the sovereign solemnly promises to govern according to the statutes in parliament agreed on, and the laws and customs of the realm; to cause law and justice in mercy to be executed in all his judgments; to maintain the laws of God, the profession of the gospel, and the Protestant reformed religion. And this oath is considered a fundamental, original, and express contract between the king and the people.

OF THE ROYAL PREROGATIVE.

By the word *prerogative* we usually understand, says Blackstone, that special pre-eminence which the king has over and above all other persons, and out of the ordinary course of the common law, in right of the crown. Prerogatives are either direct or incidental. The *direct* are such positive substantial parts of the royal character and authority as are rooted in and spring from the king's political person, considered merely in itself without reference to any other extrinsic circumstance; as the right of sending ambassadors, of creating peers, of making war and peace. The *incidental* are such as always bear a relation to something else distinct from the king's person, and are indeed only exceptions in favour of the crown to those general rules that are established for the rest of the community; such as, that no costs shall be recovered against the king; that he can never be a joint tenant; and that his debt shall be preferred before that of any of his subjects.

The substantive or direct prerogatives are such as respect the king's royal character, his royal authority, and income. The law ascribes to the king the attribute of sovereignty; and he is said to have imperial dignity, as the head of the realm, in matters both civil and ecclesiastical, owing no kind of subjection to any other potentate upon earth. No suit or action, therefore, can be brought against him, even in civil matters, because no court can have jurisdiction over him. But the law has not left the subject without remedy: for as to private injuries, if any one has a demand on the king in point of property, he may petition the Court of Chancery, where the chancellor will administer right as a matter of grace, not of compulsion; and as to public oppression, as the king cannot misuse his power without the advice of evil counsellors, and

the assistance of wicked ministers, the constitution has provided, by means of indictment and parliamentary impeachments, that no man shall dare to assist the crown in contradiction to the law of the land. Therefore, though it is a maxim, that the king can do no wrong, yet his ministers and counsellors may be punished.

The king also is not only incapable of doing wrong, but of thinking wrong; for in his political character the law will not suppose that any folly or weakness can exist, or that he can ever mean to do an improper thing; and therefore if the crown should be induced to grant any franchise or privilege to a subject contrary to reason, or in anywise prejudicial to the commonwealth or to a private person, the law declares that he was deceived in his grant, and will render such grant void.

The law also determines that the king cannot be guilty of negligence or *laches*, and therefore no delay will bar his right; *nullum tempus occurrit regi*: for the law intends that the king is always busied for the public good, and therefore has not leisure to assert his right within the times limited to his subjects. In civil actions, however, relating to landed property, the king, like a subject, is, by 9 Geo. III. c. 16. limited to sixty years.

A third attribute ascribed to the king is perpetuity. In law the king never dies, for instantly on the death of the reigning prince, the crown is vested in his heir. Hence the death of the king is called the demise or transfer of the crown.

The king is the sole magistrate of the nation, all others acting by commission from and in due subordination to him. He may, by and with the advice of his privy council, reject what bills he pleases, make any treaty, create any peers, and pardon any offences, except such where the constitution has interfered. But if the exertion of this prerogative be extended to the injury or dishonour of the nation, the parliament have a right to call his advisers to an account.

With regard to foreign concerns, the king is the delegate or representative of the people; and what is done by his authority is the act of the nation. Considered, therefore, as the representative of the people, he has the sole power of sending ambassadors to foreign states, and of receiving ambassadors at home. It is also his prerogative to make treaties, leagues, and alliances with foreign states and princes; of declaring war and peace; of issuing letters of marque and reprisal; of granting safe-conducts, without which, by the law of nations, no member of one society has a right to intrude into another.

In domestic matters, he has a variety of other prerogatives. He is one part of the legislative power, and has the power of rejecting bills in parliament; nor is he bound by any statute, unless he be particularly named therein. Yet if an act be made for the preservation of public rights and suppression of public wrongs, and do not interfere with the established rights of the crown, it is said to be as binding upon him as upon the subject. And though

he be not especially named in any particular act, he may, if he pleases, take the benefit of it.

The king is considered as the head of the army, and has the sole power of raising and regulating fleets and armies. This power extends also to forts and other strong places within the realm. He is likewise invested with the power of appointing ports and havens. He may also prohibit the importation of arms and ammunition, and may confine his subjects within the realm, or recall them when beyond the seas, on pain of fine and imprisonment when they return.

He is also the fountain of justice, and general conservator of the peace of the kingdom, and has alone the power of erecting courts of judicature; but he cannot administer justice personally, for he has delegated that power exclusively to his judges. And in order to maintain both their dignity and independence in the superior courts, it is enacted by the 18 W. III. c. 2. that their commissions shall be made, not as formerly, *durante bene placito*, but *quandiu bene se gesserint*, and their salaries ascertained and established; but that it may be lawful to remove them on the address of both houses of parliament. And now, by the 1 Geo. III. c. 23. enacted at the earnest recommendation of the king himself from the throne, the judges are continued in their offices during their good behaviour, notwithstanding any demise of the crown (which was formerly held immediately to vacate their seats), and their full salaries are absolutely continued to them during the continuance of their commissions.

In criminal proceedings, all offences are against the king. The king is also the fountain of honour, office, and privileges. All degrees of title are by his immediate grant. From the same source also arises the prerogative of erecting and disposing of offices; for honours and offices are in their nature convertible and synonymous. Upon a like reason, the king has also a prerogative of conferring privileges on private persons; such as granting place or precedence to any of his subjects; or such as converting aliens, or persons born out of his dominions, into denizens; such also is the prerogative of erecting corporations.

Another light in which the laws of England consider the king is as the arbiter of foreign commerce: and he is therefore invested with the prerogative of establishing public markets and fairs, with the toll thereunto belonging; for these can only be set up by virtue of the king's grant, or by long and immemorial usage and prescription, which prescriptions serve as grants; of regulating weights and measures; and of giving authenticity to his coin, or making it current as an universal medium of traffic.

Lastly, the king is considered as the head and supreme governor of the national church; and, in virtue of this authority, he convenes, prorogues, restrains, and dissolves the houses of convocation. From this prerogative also arises the king's right of nomination to vacant bishoprics, and certain other ecclesiastical preferments. As the head of the church likewise, the king is the

dernier resort in all ecclesiastical causes; an appeal lying ultimately to him in chancery from the sentence of any ecclesiastical judge.

OF THE REVENUE.

The king's revenue is either ordinary or extraordinary: the ordinary revenue is that which has subsisted in the crown time immemorial, or else has been granted by parliament in exchange for some hereditary revenues that were found inconvenient to the public; the extraordinary revenues are the various taxes levied by parliament.

The first branch of the *ordinary revenue* is the custody of the temporalities, or those lay lands and tenements which belong to the sees of bishops. These, on the vacancy of the see, are the property of the king, till a successor is appointed: but, by customary indulgence, this revenue is reduced to nothing; for now, as soon as the new bishop is confirmed, he receives from the king, on paying homage, the temporalities of the see untouched.

Corrodies is a privilege arising out of every bishopric, which authorizes the king to send one of his chaplains to be maintained by the bishop, or to have a pension allowed him till the bishop promotes him to a benefice; but this is now fallen into total disuse; it is, however, still due of common right, and no prescription will discharge it.

The king is also entitled to all tithes arising in extra-parochial places.

The next branch of the king's ordinary revenue consists in the first-fruits and tenths of all ecclesiastical preferments. But by the 2 Ann. c. 11. all the revenues of first-fruits and tenths are vested in trustees for ever, to form a perpetual fund for the augmentation of all livings under 50*l.* a year; which has been further regulated by the subsequent statutes, 5 Ann. c. 4; 6 Ann. c. 27; 1 Geo. I. st. 2. c. 10; 3 Geo. I. c. 10.

The fifth branch consists of the rent and profit of the demesne lands of the crown, which were either the share reserved to the crown at the original distribution of landed property, or such as it acquired afterwards by forfeiture or other means; these are divers manors, honours, and lordships, many of which have been since granted away to private persons.

Another branch of the ordinary revenue consists principally in amerciaments, or fines levied for offences against the forest laws. But few, if any, courts of this kind have been held since the reign of Charles the First.

There arise also certain fines imposed upon offenders in the courts of justice, by forfeiture of recognizances, fines upon defaulters, and from certain fees due to the crown in a variety of legal matters; such as putting the great seal to charters, writs, &c. But these have been almost all granted out to private persons, or appropriated to particular uses, so that very little of them comes into the exchequer. All future grants of them, however,

by 1 Ann. st. 2. c. 7. are to endure for no longer time than the prince's life who grants them.

Another part of the king's ordinary revenue is the right of royal fish, which are whale and sturgeon, when either thrown ashore, or caught near the coast.

Another maritime revenue is that of shipwrecks: but this revenue of wrecks is frequently granted out to lords of manors, as a royal franchise. By the charter of Henry the Second, if any thing escape alive from the ship, or if proof can be made of the property of any of the goods or lading which come to shore, they shall not be forfeited as wreck. The statute further ordains, that the sheriff of the county shall be bound to keep the goods a year and a day, that if any man can prove a property in them in his own right, or in the right of representation, they shall be restored to him without delay; but if no such property be proved within that time, they then shall be the king's. If the goods are of a perishable nature, the sheriff may sell them, and the money shall be liable in their stead.

By the 27 Edw. III. c. 13. if any ship be lost on the shore, and the goods come to land (which cannot, says the statute, be called wreck), they shall be presently delivered to the merchants, paying only a reasonable reward to those that saved and preserved them, which is entitled *salvage*. Also, by the common law, if any persons (other than the sheriff) take any goods so cast on shore, which are not legal wreck, the owners might have a commission to inquire and find them out, and compel them to make restitution.

And, by 12 Ann. st. 2. c. 18. confirmed by 4 Geo. I. c. 12. in order to assist the distressed, and to prevent the scandalous illegal practices on some of our sea-coasts, it is enacted, that all head officers and others of towns near the sea, shall, upon application made to them, summon as many hands as are necessary, and send them to the relief of any ship in distress, on pain of forfeiting 100*l*. and in case of assistance given, salvage shall be paid by the owners, to be assessed by three neighbouring justices.

All persons that secrete any goods shall forfeit their treble value: and if they wilfully do any act whereby the ship is lost or destroyed, by making holes in her, stealing her pumps, or otherwise, they are guilty of felony without benefit of clergy.

Lastly, by the 26 Geo. II. c. 19. plundering any vessel, either in distress or wrecked, and whether any living creature be aboard or not, such plundering, or preventing the escape of any person endeavouring to save his life, or wounding with intent to destroy him, or putting out false lights in order to bring any vessel into danger, are all declared to be capital felonies; in the like manner as the destroying of trees, steeples, or other stated sea-marks, is punished by the 8 Eliz. c. 13. with a forfeiture of 100*l*. or outlawry. Moreover, by the 26 Geo. II. pilfering any goods cast ashore is declared to be petit larceny.

Mines of gold and silver are also a branch of the royal revenue,

originating from the king's prerogative of coinage, in order to supply him with materials. But by the 1 W. & M. c. 30. and 5 W. & M. c. 6. no mines of copper, tin, iron, or lead, shall be looked upon as royal mines, notwithstanding gold or silver may be extracted from them in any quantities; but the king, or persons claiming royal mines under his authority, may have the ore (other than tin ore, in the counties of Devon and Cornwall), paying for the same a stated price.

Treasure-trove also, which is any money, coin, gold, silver, plate, or bullion found hidden in the earth or other private place, the owner thereof being unknown, belong to the king; but if he that hid it be known, or afterwards be found out, the owner, and not the king, is entitled to it. If it be found in the sea, or upon the earth, it does not belong to the king, but to the finder, if no owner appears.

Waifs also, which are good stolen and waived or thrown away by the thief in his flight, are given to the king, as a punishment upon the owner for not himself pursuing the felon and taking away his goods from him.

Estrays, or such valuable animals as are found wandering in any manor or lordship, and no man knows the owner of them, are given to the king; but now, by special grant of the crown, they most commonly belong to the lord of the manor. Any beast may be an estray, that is by nature tame or reclaimable, and in which there is a valuable property, as sheep, oxen, swine, and horses; but dogs, cats, and animals *feræ naturæ*, as bears or wolves, cannot be considered as estrays. Swans also may be estrays, but not any other fowl; whence they are said to be royal fowl.

The next branch of ordinary revenue consists in forfeiture of lands and goods for offences; and deodands, or whatever personal chattel is the immediate cause of the death of any reasonable creature. When a thing not in motion is the cause of a man's death, that part only which is the immediate cause is forfeited; as, if a man be climbing up the wheel of a cart, and is killed by falling from it, the wheel alone is the deodand; but wherever the thing is in motion, not only that part which immediately gives the wound (as the wheel which runs over the body), but all things which move with it, and help to make the wound more dangerous, (as the cart and loading, which increase the pressure of the wheel); are forfeited. It matters not whether the owner were concerned in the killing, or not; for if a man kills another with my sword, the sword is forfeited as an accursed thing.

No deodands are due for accidents happening upon the high sea, that being out of the jurisdiction of the common law. But if a man fall from a boat or ship in fresh water, it has been said, that the vessel and cargo are, in strictness of law, a deodand. But juries have of late very frequently taken upon themselves to mitigate those forfeitures, by finding some trifling thing, or part of an entire thing, to have been the occasion of the death. And in such cases, though the finding of the jury be hardly warranted

by law, the Court of King's Bench has generally refused to interfere on behalf of the lord of the franchise, to assert so unequivocal a claim.

Escheats of land, which happen upon the defect of heirs to succeed to the inheritance, form also part of the king's ordinary revenue.

The last branch consists in the custody of idiots and lunatics. The custody of such persons and their lands is given to the king, both by common law, as the general conservator of the people, and by the 17 Edw. II. c. 9. in order to prevent them from wasting their estates, and reducing themselves and heirs to poverty and distress. The statute directs, that the king shall have ward of natural fools, taking the profits without waste or destruction, and shall find them necessaries; and, after the death of such idiots, he shall render the estate to the heirs. The king is also the guardian of lunatics as well as of idiots, but to a very different purpose; for the law always imagines, that the misfortunes of lunacy may be removed; and therefore only constitutes the crown a trustee to protect their property, and account to them for all profits received if they recover, or after their decease to their representatives. 17 Edw. III. c. 10.

Besides these several sources of the king's ordinary revenue, there is another important branch arising in time of war, that is, what is usually termed the droits of admiralty; these consist principally of property detained or captured previous to a declaration of war, and the king's share of prize money.

But these revenues, which constituted the proper patrimony of the crown, being got into the hands of private subjects, it became necessary that private contributions should supply the public service; and these contributions, or parliamentary grants, which are usually called by the name of aids, subsidies, and supplies, form the *extraordinary revenues* of the crown, and consist in—
1. The land and assessed taxes; 2. The malt tax; 3. The customs' duties; 4. The excise duties; 5. The postage of letters; 6. The stamp duties; 7. Coach licences; 8. The duties on offices and pensions; 9. Hawkers' and pedlars' licences; 10. Post-horse duty, &c. &c.

The neat produce of these several branches of the revenue are appropriated first, and principally, to the payment of the national debt. The national debt arises by borrowing such sums of money as government may require for the current service of the state; laying taxes upon the subject sufficient to pay the interest of the sums so borrowed, and converting the principal debt into a new species of property transferable from one man to another, at any time and in any quantity. To pay the interest of the national debt, the extraordinary revenues just now enumerated, excepting the land and malt tax, are in the first place mortgaged and made perpetual, but redeemable by parliament on paying off the capital. The respective produces of the several taxes were originally separate and distinct funds; being securities for the sums advanced on

each several tax; and for them only. But it became necessary, in order to avoid a confusion, as they multiplied yearly, to reduce the number of these separate funds, by mixing and blending them together, and forming one fund out of the whole, called the Consolidated Fund.

CHAPTER III.

Of Aliens, Denizens, &c.

HAVING treated of the supreme legislative and executive powers, we now proceed to that part of the community which falls under the denomination of the *people*; the most obvious division of which is into aliens and natural-born subjects.

Natural-born subjects are such as are born within the dominions of the crown of England, that is, within the allegiance of the king; and *aliens*, such as are born out of it.

ALIENS.

An alien-born may purchase lands or other estates, but not for his own use. Yet an alien may acquire a property in goods, money, or other personal estate, or may hire a house for his habitation. Aliens also may trade as freely as other people; only they are subject to certain higher duties at the custom-house. Also an alien may bring an action concerning personal property, and may make a will, and dispose of his personal estate.

By 68 Geo. III. c. 97, no alien shall become a naturalized subject, or be made or become denizen, or become entitled to the privileges of a naturalized subject or denizen, in any other manner or by any other authority than by any act which may hereafter be passed by the parliament of the United Kingdom, or by letters of denization hereafter to be granted by his majesty, any law, custom, or usage to the contrary notwithstanding; but nothing shall extend to affect in any manner such right to naturalization or to denization as any person, in case this act had not been passed, might acquire or would have acquired by virtue of any act made for encouraging seamen to enter into his majesty's service, or for naturalizing such foreign Protestants as shall settle, in any of his majesty's colonies in America, or for naturalizing such foreign Protestants as shall have served or shall serve in his majesty's forces, or for the encouragement of the fisheries.

DENIZENS.

A denizen is an alien-born, but who has obtained *ex donatione regis* letters patent to make him an English subject. A denizen is in a kind of middle state between an alien and natural-born subject, and partakes of both of them. He may take lands by purchase or devise, which an alien may not; but cannot take by inheritance, for his parent, through whom he must claim, had no

inheritable blood. And, upon a like defect of hereditary blood, the issue of a denizen born before denization cannot inherit to him; but his issue born after may. A denizen is not excused from paying the alien's duty, and some other mercantile burdens. And no denizen can be of the privy-council, or either house of parliament, or have any office of trust, civil or military, or be capable of any grant of lands, &c. from the crown.

Naturalization.

Naturalization cannot be performed but by act of parliament; for by this an alien is put in exactly the same state as if he had been born in the king's ligeance; except only that he is incapable, as well as a denizen, of being a member of the privy-council or parliament, holding offices, grants, &c. No bill for naturalization can be received in either house of parliament, without such disabling clause in it; nor without a clause disabling the person from obtaining any immunity in trade thereby in any foreign country, unless he shall have resided in Britain for seven years next after the commencement of the session in which he is naturalized. Neither can any person be naturalized or restored in blood, unless he hath received the sacrament of the Lord's Supper within one month before the bringing in of the bill, and unless he also take the oaths of allegiance and supremacy in the presence of the parliament.

By 7 Ann. c. 5. every foreign seaman, who in time of war serves two years on board an English ship, by virtue of the king's proclamation; is *ipso facto* naturalized, under the like restrictions as in 12 W. III. c. 2; and all foreign Protestants, and Jews, upon their residing seven years in any of the American colonies, without being absent above two months at a time, and all foreign Protestants serving two years in a military capacity there, or being three years employed in the whale fishery, without afterwards absenting themselves from the king's dominions for more than one year, and none of them falling within the incapacities declared by 4 Geo. II. c. 21. shall be, upon taking the oaths of allegiance and abjuration, or in some cases an affirmation to the same effect, naturalized to all intents and purposes as if they had been born in this kingdom; except as to sitting in parliament or in the privy council, and holding offices or grants of lands, &c. from the crown within the kingdom of Great Britain or Ireland.

CHAPTER IV.

Of the Clergy.

THE clergy, comprehending all persons in holy orders, and in ecclesiastical offices, have large privileges allowed them by the

municipal laws. A clergyman cannot be compelled to serve on a jury, nor to appear at a court-leet or view of frank-pledge, which almost every other person is obliged to do; but if a layman be summoned on a jury, and before the trial takes orders, he shall, notwithstanding, appear and be sworn. Neither can he be chosen to any temporal office; as bailiff, reeve, constable, or the like. During his attendance on divine service, he is privileged from arrests in civil suits. In cases also of felony, a clerk in orders shall have the benefit of his clergy, without being branded in the hand; and may likewise have it more than once. But as they have their privileges, so also they have their disabilities. Clergymen are incapable of sitting in the house of commons; and are not, without the consent of the bishop, allowed to take any lands or tenements to farm, upon pain of 10*l.* per month, and total avoidance of the lease; nor, upon like pain, to keep any tan-house or brewhouse, nor engage in any manner of trade, nor sell any merchandize, under forfeiture of the treble value. But, by 43 Geo. III. they may buy and sell corn and cattle, the produce of their farms, or such as are necessary for their cultivation; provided they do it not in person in any fair, market, or public sale.

The clergy are divided into divers ranks and degrees; which we shall consider in their respective order.

ARCHBISHOPS AND BISHOPS.

An archbishop or bishop is elected by the chapter of his cathedral church, by virtue of a licence from the crown. And by 25 Hen. VIII. c. 20. it is enacted, that at every future avoidance of a bishopric the king may send the dean and chapter his usual licence to proceed to election; which is always to be accompanied with a letter missive from the king, containing the name of the person whom he would have them elect: and if the dean and chapter delay their election above twelve days, the nomination shall devolve to the king, who may by letters patent appoint such person as he pleases. This election or nomination, if it be of a bishop, must be signified by the king's letters patent to the archbishop of the province; if it be of an archbishop, to the other archbishop and two bishops, or to four bishops, requiring them to confirm, invest, and consecrate the person so elected, which they are bound to perform immediately. After which the bishop elect shall sue to the king for his temporalities, shall make oath to the king and none other, and shall take restitution of his secular possessions out of the king's hands only. And if such dean and chapter do not elect in the manner by this act appointed, or if such archbishop or bishop do refuse to confirm, invest, and consecrate such bishop elect, they shall incur all the penalties of a *præmunire*.

An archbishop is the chief of the clergy in a whole province, and has the inspection of the bishops of that province, as well as of the inferior clergy, and may deprive them on notorious cause. The archbishop has also his own diocese, wherein he exercises episcopal jurisdiction, as in his province he exercises archiepiscopal.

copal. As archbishop, he, upon receipt of the king's writ, calls the bishops and clergy of his province to meet in convocation; but without the king's writ he cannot assemble them. To him all appeals are made from inferior jurisdictions within his province; and as an appeal lies from the bishops in person to him in person, so it also lies from the consistory courts of each diocese to his archiepiscopal court. During the vacancy of any see in his province, he is guardian of the spiritualities thereof, as the king is of the temporalities, and he executes all ecclesiastical jurisdiction therein. If an archiepiscopal see be vacant, the dean and chapter are the spiritual guardians. The archbishop is entitled to present by lapse to all the ecclesiastical livings in the disposal of the diocesan bishops, if not filled within six months. And the archbishop has a customary prerogative, when a bishop is consecrated by him, to name a clerk or chaplain of his own, to be provided for by such suffragan bishop; in lieu of which it is now usual for the bishop to make over by deed to the archbishop, his executors and assigns, the next presentation of such dignity or benefice in the bishop's disposal within that see, as the archbishop himself shall choose, which is therefore called his *option*: which options are only binding on the bishop himself who grants them, and not on his successors.

It is the privilege, by custom, of the archbishop of Canterbury to crown the kings and queens of England. And he hath also by the 25 Hen. VIII. c. 21. the power of granting dispensations, in any case not contrary to the holy scriptures and the law of God, where the pope used formerly to grant them; which is the foundation of his granting special licences to marry at any place or time, to hold two livings, and the like; and on this also is founded the right he exercises of conferring degrees in prejudice of the two universities.

The power and authority of a bishop consist principally in inspecting the manners of the people and clergy, and punishing them in order to reformation by ecclesiastical censures. To this purpose he has several courts under him, and may visit at pleasure every part of his diocese. His chancellor is appointed to hold his courts for him, and to assist him in matters of ecclesiastical law; who, as well as all other ecclesiastical officers, if lay or married, must be a doctor in the civil law, so created in some university. It is also the business of a bishop to institute and to direct induction to all ecclesiastical livings in his diocese.

Archbishoprics and bishoprics may become void by death, deprivation for any gross and notorious crime, and also by resignation. All resignations must be made to some superior. Therefore a bishop must resign to his metropolitan; but the archbishop can resign to none but the king himself.

DEANS.

A dean and chapter are the council of the bishop, to assist him with their advice in affairs of religion, and also in the temporal concerns of his see.

All ancient deans are elected by the chapter, by *congé d'elire* from the king, and letters missive of recommendation, in the same manner as bishops: but in those chapters that were founded by Henry VIII. out of the spoils of the dissolved monasteries, the deanery is donative, and the installation merely by the king's letters patent. The chapter, consisting of canons of prebendaries, are sometimes appointed by the king, sometimes by the bishop, and sometimes elected by each other.

The dean and chapter are the nominal electors of a bishop. The bishop is their ordinary and immediate superior; and has the power of visiting them, and correcting their excesses and enormities.

Deaneries and prebends may become void, like a bishopric, by death; by deprivation; or by resignation, either to the king or the bishop. Also if a dean, prebendary, or other spiritual person, be made a bishop, all the presentments of which he was before possessed are void; and the king may present to them. But they are not void by the election, but only by the consecration.

ARCHDEACONS.

An archdeacon hath an ecclesiastical jurisdiction, immediately subordinate to the bishop, throughout the whole of his diocese, or in some particular part of it. He is usually appointed by the bishop himself; and hath a kind of episcopal authority originally derived from the bishop, but now independent and distinct from his. He therefore visits the clergy; and has his separate court for punishment of offenders by spiritual censures, and for hearing all other causes of ecclesiastical cognizance.

PARSONS AND VICARS.

The most numerous order of ecclesiastical persons are the parsons and vicars of churches.

A *parson* is one that hath full possession of all the rights of a parochial church. He is called parson, *persona*, because by his person the church, which is an invisible body, is represented; and he is in himself a body corporate, in order to protect and defend the rights of the church (which he personates) by a perpetual succession. He is sometimes called the rector or governor of the church.

A parson has, during his life, the freehold in himself of the parsonage-house, the glebe, the tithes, and other dues. But these are sometimes *appropriated*; that is to say, the benefice is perpetually annexed to some spiritual corporation, either sole or aggregate, being the patron of the living. But, in order to complete such appropriation effectually, the king's licence and consent of the bishop must first be obtained; because both the king and the bishop may some time or other have an interest, by lapse, in the presentation to the benefice; which can never happen if it be appropriated to the use of a corporation, which never dies. The consent of the patron is also necessarily implied; because the appropriation can be originally made to none but such spiritual

corporation as is also the patron of the church; the whole being nothing else but an allowance for the patrons to retain the tithes and glebe in their own hands, without presenting any clerk, they themselves undertaking to provide for the service of the church. When the appropriation is thus made, the appropriators and their successors are perpetual parsons of the church; and must sue and be sued, in all matters concerning the rights of the church, by the name of parsons.

This appropriation may be severed, and the church become disappropriate, two ways: as, first, if the patron or appropriator present a clerk, who is instituted and inducted to the parsonage; for the incumbent so instituted and inducted is to all intents and purposes complete parson; and the appropriation being once severed, can never be re-united again, unless by a repetition of the same solemnities. And when the clerk so presented is distinct from the vicar, the rectory thus vested in him becomes what is called a *sinecure*; because he hath no cure of souls, having a vicar under him to whom that cure is committed. Also, if the corporation which has the appropriation be dissolved, the parsonage becomes disappropriate at common law; because the perpetuity of person is gone, which is necessary to support the appropriation.

The distinction of a parson and vicar is this: the parson has for the most part the whole right to all the ecclesiastical dues in his parish; but the vicar has generally an appropriator over him, entitled to the best part of the profits, to whom he is in effect perpetual curate, with a standing salary; though, in some places, the vicarage has been considerably augmented by a large share of the great tithes; which augmentations were greatly assisted by the 22 Car. II. c. 8. enacted in favour of poor vicars and curates, which rendered such temporary augmentation (when made by the appropriators) perpetual.

The method of becoming a parson or vicar is much the same. To both there are four requisites necessary: holy orders, presentation, institution, and induction. By the 18 & 14 Car. II. c. 4. no person is capable to be admitted to any benefice, unless he hath been first ordained a priest, and then he is a clerk in orders. But if he obtain orders, or a licence to preach, by money or corrupt practices, the person giving such orders forfeits 40*l.* and the person receiving 10*l.* and is incapable of ecclesiastical preferment for seven years. And by 44 Geo. III. c. 43. it is enacted, that no person shall be admitted a deacon in England or Ireland before he shall have attained the age of three and twenty years complete; and that no person shall be admitted a priest before the complete age of twenty-four.

Every admission at an earlier age shall be void, as if no such admission had been made, and the person admitted shall be incapable of holding any ecclesiastical preferment: but no lapse shall incur until the ordinary has given the patron notice of the avoidance six months.

Any clerk may be presented to a parsonage or vicarage; that is, the patron, to whom the advowson of the church belongs, may offer his clerk to the bishop of the diocese to be instituted. But when a clerk is presented, the bishop may refuse him upon many accounts. As, if the patron be excommunicated, and remain in contempt forty days. Or, if the clerk be unfit; which unfitness is of several kinds. First, with regard to his person, as if he be an outlaw, an excommunicate, an alien, under age, or the like. Next, with regard to his faith or morals; as, for any particular heresy, or vice that is *malum in se*: but if the bishop allege only generals, as that he is *schismaticus inveteratus*, or object a fault that is *malum prohibitum* merely, as haunting taverns, playing at unlawful games, or the like, it is not good cause of refusal. Or, lastly, the clerk may be unfit to discharge the pastoral office for want of learning. In any of which cases the bishop may refuse the clerk. In case the refusal be for heresy, schism, inability of learning, or other matter of ecclesiastical cognizance, the bishop must give notice to the patron of such his cause of refusal; else he cannot present by lapse: but if the cause be temporal, he is not bound to give notice.

If an action be brought by the patron against the bishop for refusing his clerk, the bishop must assign the cause. If the cause be of a temporal nature, and the fact admitted (as for instance, outlawry), the judges of the king's courts must determine its validity, or whether it be sufficient cause of refusal; but if the fact be denied, it must be determined by a jury. If the cause be of a spiritual nature (as heresy, particularly alleged), the fact, if denied, shall also be determined by a jury; and if the fact be admitted or found, the court, upon consultation and advice of learned divines, shall decide its sufficiency. If the cause be want of learning, the bishop need not specify in what points the clerk is deficient, but only allege that he is deficient; for the 9 Edw. II. st. 1. c. 13. is express, that the examination of the fitness of a person presented to a benefice belongs to the ecclesiastical judge. But, because it would be nugatory in this case to demand the reason of refusal from the ordinary, if the patron were bound to abide by his determination, who has already pronounced his clerk unfit; therefore, if the bishop return the clerk to be *minus sufficiens in literaturâ*, the court shall write to the metropolitan to re-examine him, and certify his qualification; which certificate of the archbishop is final.

If the bishop have no objections, but admit the patron's presentation, the clerk so admitted is next to be instituted by him; which is a kind of investiture of the spiritual part of the benefice; for by institution the cure of the souls of the parish is committed to the charge of the clerk. When the ordinary is also the patron, and confers the living, the presentation and institution are one and the same act, and are called a *collation* to a benefice. By institution or collation the church is full, so that there can be no fresh presentation till another vacancy, at least in the case of a common patron: but the church is not full against the king, till

induction; nay, even if the clerk be instituted upon the king's presentation, the crown may revoke it before induction, and present another clerk. Upon institution also the clerk may enter on the parsonage-house and glebe, and take the tithes; but he cannot grant or let them, or bring an action for them, till induction.

Induction is performed by a mandate from the bishop to the archdeacon, who usually issues out a precept to other clergymen to perform it for him. It is done by giving the clerk corporal possession of the church, as by holding the ring of the door, tolling a bell, or the like. This, therefore, is the investiture of the temporal part of the benefice, as institution is of the spiritual. And when a clerk is thus presented, instituted, and inducted into a rectory, he is then, and not before, in full and complete possession, and is called in law *persona parsonata*, or parson imparsonee.

By the 57 Geo. III. c. 99. (which recites the 21 Hen. VIII. c. 13; 28 Hen. VIII. c. 13; 13 Eliz. c. 20; 14 Eliz. c. 11; 18 Eliz. c. 11; 43 Eliz. c. 9; 3 Car. I. c. 4; 43 Geo. III. c. 84; 43 Geo. III. c. 109; 12 Ann. st. 2. c. 12; 36 Geo. III. c. 83. and 53 Geo. III. c. 149.) it is enacted, that so much of the said several acts of Henry VIII. and Charles I. as relates to spiritual persons holding of farms, and to leases of benefices and livings, and to buying and selling, and to residence of spiritual persons on their benefices; and also so much of the acts of Anne, and of the 36 Geo. III. as relates to the maintenance of curates, and all the said several other acts passed in the reign of Geo. III. are repealed.

And by section 2, it is made unlawful for any spiritual person holding any dignity, prebend, canonry, benefice, or any stipendiary curacy or lectureship, to take to farm, for occupation by himself, by lease, grant, words, or otherwise, for term of life or years, or at will, any lands exceeding in the whole eighty acres, without the consent of the bishop of the diocese; and every such permission for any greater quantity shall specify the number of years, not exceeding seven, for which the permission is given; and every such spiritual person, who shall without such permission take to farm any greater quantity of land than eighty acres, shall forfeit, for every acre above eighty, forty shillings for every year during which he shall so occupy, use, cultivate, or farm such land, to be recovered to the use of any person who may sue.

No spiritual person is allowed to carry on any kind of trade whatever; but he may keep a school, and purchase books for the use thereof, and may again sell such books, if not wanted for the use of the school.

By this statute also, incumbents are permitted to be absent three months without being subject to any penalty. If they are absent between three and six months, they forfeit one-third of the annual value of the benefice after all deductions, except the curate's stipend; if exceeding six and not eight months, one half; when eight months, two-thirds; and when the whole of the year, three-fourths, to any one who will sue. *Sinecure* rectories are exempted. All who were exempted from non-residence before the passing of this act, are still exempt; and this statute extends the exemption to seve-

ral others specified in the statute, and to all public officers in either university, and to tutors and public officers in any college.

Persons having a benefice without any residence thereon, and who shall have resided nine months in the year within the limits of the parish in which the benefice is situated (provided it be within two miles), are exempt from the penalties.

Where the governors of Queen Anne's bounty have provided houses for the residence of officiating ministers, such houses shall be deemed houses of residence appertaining to benefices.

Rectories having vicarages endowed, the residence of the vicar in the rectory-house shall be deemed a legal residence, provided it be kept in proper repair.

Where there is not a house of residence belonging to any benefice, the bishop may allow a fit one within its limits.

No spiritual person appointed to any prebend, canonry, or dignity, shall be subject to any penalty for non-residence.

Every spiritual person having a house of residence upon his benefice, is required to keep it in repair, upon pain of incurring all penalties for non-residence.

The person of the incumbent shall not be taken in execution, if the penalties can be raised by sequestration. The bishop's certificate shall be evidence of the annual value.

The bishop is authorized to grant licences for non-residence in a great variety of cases; and no person is to have the benefit of an exemption, unless he make a notification of it every year, within six weeks from the first of January, to the archbishop or bishop of the diocese. The bishop may grant a licence for non-residence, for the illness or infirmity of the incumbent, his wife, or child; where there is not a fit house of residence, if the unfitness be not occasioned by the incumbent's neglect; if he live in his own or any relation's house within the parish; if he serve another church as curate or preacher; and if he be master or usher of an endowed school, and licensed by the bishop. These, and some others, are grounds for the grant of a licence; and if the bishop refuse, the incumbent may appeal to the archbishop. The bishop may grant licences for causes not enumerated in the statute; but they must have afterwards the allowance of the archbishop. Licences may be revoked, and if not revoked are in force only for three years. A list of all the exemptions and licences for non-residence shall be transmitted every year to the king in council, and lists of the exemptions and licences must be kept by the registrar of each diocese; and any person may inspect them on paying three shillings.

The bishop may compel residence, by monition and censure in his court, but not unless the non-residence exceed three months in one year.

If an action for the penalties be commenced, and the bishop issue his monition, he shall sequester the profits of the benefice to pay the penalties and costs of the action; if the bishop issue his monition before the commencement of the action, it is a bar to the action. If the bishop's monition to reside be not complied with within thirty days, he may sequester the profits of the living

till it is complied with. The profits sequestered may be applied by the bishop to the improvement of the parsonage-house and glebe, or to the fund of Queen Anne's bounty. Vicars are no longer to take an oath that they will reside. If an incumbent be called into residence by a bishop, and if there be any tenant residing in the parsonage-house, a copy of the order shall be served upon the tenant by one of the churchwardens: and if he do not quit the premises on the day specified in the order, he shall forfeit 40*s.* for every day he continues afterwards on the premises, and all his contracts with the incumbent are void. The king's prerogative to grant dispensations for non-residence is not affected by the statute.

We have seen that there is but one way whereby one may become a parson or vicar; there are many ways by which one may cease to be so.

1. By death.

2. By cession, in taking another benefice; for by 21 Hen.VIII. c. 13. if any one, having a benefice of 8*l.* per annum, or upwards, according to the present valuation in the king's books, accept any other, the first shall be adjudged void, unless he obtain a dispensation, which no one is entitled to have, but the chaplains of the king and others therein mentioned,* the brethren and sons of lords and knights, and doctors and bachelors of divinity and law, admitted by the universities of this realm. And a vacancy thus made is called a *cession*. But both the livings must have cure of souls; and the statute expressly excepts deaneries, archdeaconries, chancellorships, treasurerships, chanterhips, prebends, and sinecure rectories; a dispensation in this case can only be granted to hold one benefice more, except to clerks who are of the privy council, who may hold three by dispensation. By the canon law, no person can hold a second incompatible benefice without a dispensation; and in that case, if the first be under 8*l.* per annum, it is so far void, that the patron may present another clerk, or the bishop may deprive; but till deprivation no advantage can be taken by lapse.

3. It will cease also by consecration; for when a clerk is promoted to a bishopric, all his other preferments are void the instant that he is consecrated. But there is a method, by the favour of the crown, of holding such livings in *commendam*.

Commenda, or *ecclesia commendata*, is a living commended by the crown to the care of a clerk, to hold till a proper pastor be pro-

* The number of the chaplains of the king and royal family who may have dispensations is unlimited. An archbishop may have eight; a duke and bishop, six; a marquis and earl, five; a viscount, four; the chancellor, a baron, and knight of the garter, three; a duchess, marchioness, countess, and baroness, being widows, two; the king's treasurer, comptroller, secretary, dean of the chapel, almoner, and the master of the rolls, two; the chief justice of the King's Bench, and warden of the cinque ports, one. These chaplains only can obtain a dispensation under the statute.

If one person have two or more of these titles or characters united in himself, he can only retain the number of chaplains limited to his highest degree; and if a nobleman retain his full number of chaplains, no one of them can be discharged, so that another shall be appointed in his room, during his life. 4 Co. 90. The king may present his own chaplains, *i. e.* waiting chaplains in ordinary, to any number of livings in the gift of the crown, and even in addition to what they hold upon the presentation of a subject, without dispensations; but a king's chaplain, being beneficed by the king, cannot afterwards take a living from a subject, but by a dispensation according to the statute.

vided for it. This may be temporary, for one, two, or three years, or perpetual; being a kind of dispensation to avoid the vacancy of the living, and is called a *commendā retinere*. There is a *commendā recipere* which is to take a benefice *de novo*, in the bishop's own gift, or the gift of some other person consenting to the same; and this is the same to him as institution and induction.

4. It will cease also by resignation.

5. Or by deprivation: either, first, by sentence declaratory in the ecclesiastical court, for fit and sufficient causes allowed by the common law: such as attainder of treason or felony, or conviction of other infamous crime in the king's courts; for heresy, infidelity, gross immorality, or the like: or, secondly, in pursuance of divers penal statutes, which declare the benefice void, for some nonfeasance or neglect, or else for some malfeasance or crime; as, for simony; for maintaining any doctrine in derogation of the king's supremacy, or of the thirty-nine articles, or of the book of common prayer.

It ceases for neglecting after institution to read the liturgy or articles in the church, or make the declarations against popery, or take the abjuration oath; for using any other form of prayer than the liturgy of the church of England; or for absenting himself sixty days in one year from a benefice belonging to a Popish patron, to which the clerk was presented by either of the universities; in all which and similar cases, the benefice is *ipso facto* void, without any formal sentence or deprivation.

CURATES.

A curate is the lowest degree in the church; being in the same state that a vicar was formerly, an officiating temporary minister, instead of the proper incumbent: though there are what are called *perpetual* curacies, where all the tithes are appropriated, and no vicarage endowed (being for some particular reasons exempted from the statute of Hen. IV.), but instead thereof such perpetual curate is appointed by the appropriator.

By the 57 Geo. III. c. 99. when any curate is appointed to serve a benefice upon which the incumbent is non-resident for more than three months, from exemption, licence, or otherwise, such curate shall be required to reside within the parish; provided the gross value amount to 300*l.* a year, and the population to 300 persons, or the population amount to 1000 persons or upwards, whatever may be the value; but whenever great inconvenience would arise from such curate being compelled to reside within the parish, it shall be lawful for the bishop to allow him to reside in some near place, provided the licence specify the special circumstances.

Whenever it shall appear to any bishop, that, by reason of the number of churches or chapels belonging to any benefice, or the distance from each other, or the distance of the residence of the spiritual person, or his negligence, that the duties are inadequately performed, such bishop may require the spiritual person to nominate a fit person or persons, with sufficient stipends, to be licensed by him to perform or to assist in performing such duties; and if such spiritual person shall neglect to make such nomination for

three months, then the bishop may appoint a curate or curates, with such stipend or stipends as he shall think fit, not exceeding in the whole the stipends allowed by this act, nor (except in the case of negligence) exceeding one-half of the gross annual value of the benefice. § 51.

If any difference arise between any rector or vicar and his curate, touching the stipend, or the payment thereof, or of the arrears thereof, the bishop may summarily hear and determine the same; the curate, on obtaining his licence, shall pay to the secretary of the bishop 1*l.* exclusive of the stamp duty; also, as often as any person shall be licensed to two or more curacies within the same diocese, it shall be sufficient to sign one declaration only under the act of uniformity. § 53.

In every case in which any spiritual person shall have been, after the 20th of July, 1813, or shall hereafter become incumbent or possessed of any benefice, and shall not duly reside thereon, (unless such person shall do the duty of the same, having a legal exemption from residence, or a licence to reside out of the same), he shall appoint for the curate licensed to serve such benefice in his absence a salary as follows; (that is to say)—Such salary shall in no case be less than 80*l.* per annum, or than the annual value of the benefice, if the gross value thereof shall not amount to 80*l.*; and not less than 100*l.* per annum, or than the whole value if the value shall not amount to 100*l.* in any parish where the population shall amount to or exceed three hundred persons; and not less than 120*l.* per annum, or the whole value as aforesaid if the value shall not amount to 120*l.* in any parish where the population shall appear to amount to or exceed five hundred persons; and not less than 150*l.* per annum, or than the whole value as aforesaid if the value shall not amount to 150*l.* in any parish where the population shall appear to amount to or exceed one thousand persons. § 55.

If any parish where the actual annual income of the benefice, clear of all deductions, exceeds 400*l.* per annum, the bishop may assign to the curate a salary of 100*l.* per annum, notwithstanding the population may not appear to amount to three hundred persons; and where it shall appear to exceed 400*l.* and where the population shall also appear to amount to or exceed five hundred persons, he may assign to the curate any larger stipend, so that the same shall not exceed by more than 50*l.* per annum the amount of stipend hereinbefore required to be assigned. § 56.

In every case in which any spiritual person has become non-resident from age, sickness, &c. and great hardship would arise if the full amount of salary should be allowed, then the bishop may assign any salary less than the said full amount. § 57.

No spiritual person shall serve more than two churches in one day, or two chapels, or one church and one chapel, in one day, unless from the local situation, or from the value of the benefices, or other special causes, it may be expedient, for the performance of ecclesiastical duties, to grant licence to serve three. § 59.

Where any bishop shall find it necessary to license any person holding any benefice to serve as curate of any adjoining parish,

such bishop may appoint a salary less by a sum not exceeding 30*l.* per annum than the salary which the bishop is required to appoint; and where he shall find it necessary to license the same person to serve as curate for more than one parish, he is to direct that during such time the salary shall be less by a sum not exceeding 30*l.* per annum than the salary which he is required to appoint. § 60.

All agreements and contracts between persons holding benefices and their curates, in fraud or derogation of the provisions of this act, are void. § 61.

Where the person holding any benefice is not resident for four months, the bishop may allot, if he think fit, for the residence of the curate, the parsonage or vicarage house, or usual house of residence, if there shall be any such, or any part thereof, § 64.

The bishop may, at any time, upon three months notice, direct the curate to deliver up any parsonage or vicarage house and appurtenances; and, in case of refusal, he shall forfeit to the rector or vicar 40*s.* for every day. § 66.

And every curate who shall reside in the house or residence of any benefice which shall become vacant, shall quit such house within three months after the institution of any spiritual person thereto, upon being required so to do by the person instituted, and having one month's previous notice. § 67.

No curate shall quit any benefice to which he shall be licensed until after three months notice, unless with the consent of the bishop, upon pain of forfeiting to the person holding the benefice not exceeding the amount of his stipend for six months. § 68.

The bishop may license any curate actually employed by the incumbent, although no express nomination shall have been made to him; and he shall have power to revoke summarily and without process any licence granted to any curate, and to remove such curate, for any cause which shall appear to be good and reasonable. § 69.

CHAPTER V.

Of Public Officers.

SHERIFFS.

THE sheriff is an officer of great antiquity, and was formerly chosen by the several counties. But the custom now is, that all the judges, together with the great officers of state, meet in the exchequer on the morrow of St. Martin, in Michaelmas term; and there the judges propose three persons to be reported (if approved of) to the king, who afterwards appoints one to be sheriff.

Sheriffs are to continue in their office no longer than one year. But till a new sheriff be named, his office cannot be determined, unless by his own death, or the demise of the king.

The sheriff, in his judicial capacity, is to hear and determine all causes of forty shillings value and under, in his county-court.

He is likewise to decide the elections of knights of the shire, of coroners, and of verderors; to judge of the qualification of voters; and to return such as shall be duly elected.

As the keeper of the king's peace, he is the first man in his county. He may apprehend and commit to prison all persons who break the peace, or attempt to break it; and may bind any one in a recognizance to keep the king's peace. He may, and is bound *ex officio* to pursue and take all traitors, murderers, felons, and other mis-doers. He is also to defend his county against any of the king's enemies; and for this purpose, as well as for keeping the peace and pursuing felons, he may command all the people of his county to attend him; which is called the *posse comitatûs*, or power of the county.

In his ministerial capacity he is bound to execute all process issuing from the courts of justice. In the commencement of civil causes, he is to serve the writ, to arrest, and to take bail; when the cause comes to trial, he must summon and return the jury; when it is determined, he must see the judgment carried into execution. In criminal matters, he also arrests and imprisons, he returns the jury, and executes the sentence of the court.

As the king's bailiff, it is his business to preserve the rights of the king within his bailiwick. He must seize to the king's use all lands devolved to the crown by attainder or escheat; must levy all fines and forfeitures; must seize and keep all waifs, wrecks, estrays, and the like, unless they be granted to some subject; and must also collect the king's rents within his bailiwick, if commanded by process from the Exchequer.

The under-sheriff usually performs all the duties of the office, a very few only excepted. But no under-sheriff can hold his office above one year; if he do, he forfeits 200*l*. And no under-sheriff, or sheriff's officer, shall practise as an attorney during the time he continues in such office.

Every sheriff is required by law, upon his appointment, to signify to the General-Post Office the place where his general business is to be transacted during his shrievalty.

BAILIFFS.

Bailiffs, or sheriff's officers, are either bailiffs of hundreds, or special bailiffs. Bailiffs of hundreds are officers appointed over those respective districts by the sheriffs, to collect fines therein, to summon juries; to attend judges and justices at the assizes and quarter sessions. The duty of special bailiffs is to execute writs and process in the several hundreds.

GAOLERS.

Gaolers are the servants of the sheriff, and he must be responsible for their conduct. Their business is to keep safely all such persons as are committed to them by lawful warrant.

CORONERS.

The coroner is a very ancient officer. He is chosen for life; but may be removed, either by being made sheriff, or chosen ver-

deror; or by the king's writ *de coronatore exonerando*, for causes therein assigned, as, that he is engaged in other business, is incapacitated by years or sickness, hath not a sufficient estate in the county, or lives in an inconvenient part of it. And by the 25 Geo. II. c. 20. extortion, neglect, or misbehaviour, are also made causes of removal.

The office and power of a coroner consist, first, in inquiring, when any person is slain, or dies suddenly, or in prison, concerning the manner of his death. And this must be "*super visum corporis*:" for if the body be not found, he cannot sit. He must also sit at the very place where the death happened. If any be found guilty of murder or other homicide, he is to commit them to prison for trial, and is also to inquire concerning their lands, goods, and chattels, which are forfeited thereby; but, whether it be homicide or not, he must inquire whether any deodand has accrued to the king, or the lord of the franchise; and must certify the whole, with the evidence thereon, to the court of King's Bench, or the next assizes. Another branch of his office is to inquire concerning shipwrecks; and whether wreck or not, and who is in possession of the goods. Concerning treasure-trove, he is also to inquire who were the finders, and where it is, and whether any be suspected of having found and concealed a treasure.

The ministerial office of the coroner is only as the sheriff's substitute. For when just exception can be taken to the sheriff, for suspicion of partiality (as, that he is interested in the suit, or of kindred to either plaintiff or defendant), the process must then be awarded to the coroner, instead of the sheriff.

JUSTICES OF THE PEACE.

Justices of the peace are appointed by the king's special commission under the great seal: and when any justice intends to act under this commission, he sues out a writ of *dedimus potestatem* from the clerk of the crown in chancery, empowering certain persons therein named to administer the usual oaths to him.

By 5 Geo. II. c. 18. every justice, except as is therein excepted, shall have 100*l.* per annum clear of all deductions; and if he act without this qualification, he shall forfeit 100*l.* By 5 Geo. II. no practising attorney, solicitor, or proctor, shall be capable of acting as a justice of the peace.

As the office of justice of the peace is conferred by the king, so it subsists only during his pleasure, and is determinable by the demise of the crown, or in six months after. But if the same justice be put in commission by the successor, he shall not be obliged to sue out a new *dedimus*, or to swear to his qualification afresh, nor, by reason of any new commission, to take the oaths more than once in the same reign. Or it is determinable by express writ under the great seal, discharging any particular person from being any longer justice. Or by superseding the commission by writ of *supersedeas*, which suspends the power of all the justices, but does not totally destroy it; seeing it may be revived again by another writ called a *procedendo*. Or by a new commission, which virtually, though silently, discharges all the former justices

that are not included therein. Or by accession of the office of sheriff or coroner.

The power, office, and duty of a justice of the peace, depend on his commission, and on the several statutes which have created objects of his jurisdiction. His commission, first, empowers him singly to conserve the peace, and to take securities for the peace, and to apprehend and commit felons and other inferior criminals. It also empowers any two or more to hear and determine all felonies and other offences, which is the ground of their jurisdiction at sessions. There are many statutes made to protect justices of the peace in the upright discharge of their office, which, among others, prohibit such justices from being sued for any oversight without notice beforehand, and to stop all suits begun, on tender made of sufficient amends. But, on the other hand, any malicious or tyrannical abuse of their office is severely punished; and all persons who recover a verdict against a justice, for any wilful or malicious injury, are entitled to double costs.

By the 1 & 2 Geo. IV. c. 63. any justice of the peace acting for any county at large, or for any riding or division of a county in which there are several and distinct commissions of the peace, is authorized to act as a justice for such county, riding, or division, in sessions or otherwise, at any place within any city, town, or other precinct having exclusive jurisdiction, but not being a county of itself, situate within, surrounded by, or adjoining to such county at large, riding, or division: but not to act or intermeddle in any matters or things arising within such city, town, or precinct.

By the 4 Geo. IV. c. 27. in all cases where the number of justices of the peace is limited, and any one, two, or more only are of the quorum, all acts, orders, adjudications, warrants, indentures of apprenticeships, or other instruments, which shall be made, either in or out of the general quarter sessions or petty sessions, or any adjournment thereof, though neither of the said justices be of the quorum, shall be valid in law.

By the 57 Geo. III. c. 45. all offices, civil or military, held during pleasure, by any person, at the time of the demise of his majesty, are continued without any new patent, commission, warrant, or authority, until the pleasure of his majesty's successor is known.

CHAPTER VI.

Of Parish Officers, and Parochial Affairs.

CHURCHWARDENS.

CHURCHWARDENS are persons annually chosen by the consent of the ministers and parishioners, to look after the church, churchyard, and such things as belong to both; and to observe the behaviour of the parishioners, for such faults as appertain to the jurisdiction or censure of the ecclesiastical court.

All peers of the realm are exempted from the office of churchwarden, as are also members of parliament.

A counsellor or attorney ought not to be chosen churchwarden; and if he be, he may have a prohibition, by reason of his attendance at the courts at Westminster.

Clerks in court are exempted for a similar reason.

Physicians, surgeons, and apothecaries, are exempted by express act of parliament.

And every dissenting teacher or preacher in holy orders, or pretended holy orders.

Other dissenters, if they should be chosen or otherwise appointed to bear the office of churchwarden or any other parochial office, who shall scruple to take upon them such office in regard of the oaths, or any other matter which might be required of them, may execute the same by a sufficient deputy, to be approved of in like manner as other churchwardens.

By the 2 Geo. III. c. 20. no serjeant, corporal, drummer, or private man, personally serving in the militia, during the time of such service, shall be liable to serve as a churchwarden.

By the 10 & 11 W. III. c. 23. § 2. persons who have prosecuted a felon to conviction, and the first assignee of the certificate thereof, were formerly exempted; but, now, by the 58 Geo. III. the certificate cannot be assigned over to any other person.

No person living out of the parish, though he should occupy lands within the parish, can be chosen churchwarden.

Churchwardens are to be chosen annually in Easter week, by the joint consent of the minister and parishioners; but if they cannot agree, the minister shall choose one, and the parishioners another. But these canons, not having been confirmed by the legislature, are observed in such cases only where they do not militate against the known laws of the realm, or the established usages and customs of particular parishes.

In the city of London the custom is, for the parishioners of each parish to choose both the churchwardens, without the assistance or interference of the minister. But custom, in order to be valid, must have been established and continued at least as early as the first year of Richard I. Therefore the parishes in London, which were erected by 9 Ann. c. 22. must, in respect of election, be regulated by the canons.

The first thing required of the churchwardens is to take an oath of office before the archdeacon, or other ecclesiastical judge of the diocese, previous to their entering on their official duties, which is usually in the first week after Easter.

Churchwardens, being the guardians or keepers of the church, are entrusted with the care and management of the goods and personal property belonging to the church, which they are to order for the best advantage of the parishioners; but they have no interest in, or power over the freehold of the church itself, or of any land or other real property belonging to it: these are the property of the parson or vicar, who alone is legally interested in its loss or preservation. The churchwardens, therefore, may purchase

goods and such articles for the use of the parish. They may likewise, with the assent of the parishioners, sell, or otherwise dispose of the goods of the church. But without such consent they are not authorized to alienate any of the property under their care.

But they cannot exercise any power over the church-yard, or any thing annexed to the freehold of the church: if, therefore, the trees in the church-yard be cut down, or the grass destroyed, or if the walls, windows, or doors of the church be broken, the incumbent (or his lessee), and not the churchwardens, are to require a recompence for the injury. Nor can they take lands devised to the parish for the repairs or other use of the church, not even though it be but a term for years. If lands are intended to be given to the parish for the use of the church, they should therefore be devised to the trustees for the use intended, and not to the churchwardens and their successors, which would be a void demise.

In the city of London, however, the parson and churchwardens, by special custom, form together one individual corporation for the benefit of the church, and may purchase or hold lands, as well as goods, for the use of the church. It is on this account, that in London the parishioners choose both the churchwardens, independent of the minister; for if the minister, being himself one, were allowed to nominate another of the three persons who constitute the corporation, he would possess too much power over the parish interests.

By the 58 Geo. III. c. 60. for the regulation of parish vestries, it is enacted, that, from and after the 1st of July, 1818, no vestry or meeting of the inhabitants in vestry in or for any parish shall be holden, until public notice shall have been given of such vestry, and of the place and hour of holding the same, and the special purpose thereof, three days before the day to be appointed for holding such vestry, by the publication of such notice in the parish church or chapel on some Sunday, during or immediately after divine service, and by affixing the same, fairly written or printed, on the principal door of such church or chapel. § 1.

And for the more orderly conduct of vestries, in case the rector or vicar, or perpetual curate, shall not be present, the persons so assembled shall forthwith appoint, by plurality of votes, to be ascertained as hereinafter directed, one of the inhabitants to be the chairman of and preside in every such vestry; and in all cases of equality of votes the chairman shall (in addition to such vote or votes as he may, by virtue of this act, be entitled to give, in right of his assessment) have the casting vote; and minutes of the proceedings and resolutions of every vestry shall be fairly entered in a book (to be provided for that purpose by the churchwardens and overseers), and shall be signed by the chairman, and by such other of the inhabitants present as shall think proper to sign the same. § 2.

In all such vestries, every inhabitant present, who shall, by the last rate made for the relief of the poor, have been assessed in respect of any annual rent, profit, or value, not amounting to fifty pounds, shall be entitled to give one vote, and no more; amounting to fifty pounds or upwards (whether in one or in more than one

charge), shall be entitled to give one vote for every twenty-five pounds in respect of which he shall have been assessed, so nevertheless that no inhabitant shall be entitled to give more than six votes; and where two or more of the inhabitants present shall be jointly rated, each shall be entitled to vote according to the proportion which shall be borne by him of the joint charge; and where only one of the persons jointly rated shall attend, he shall be entitled to vote according to the whole of the joint charge. § 3.

And when any person shall have become an inhabitant of any parish, or become liable to be rated therein, since the making of the last rate, he shall be entitled to vote in respect of the property for which he shall have become liable to be rated, and shall consent to be rated, in like manner as if he should have been actually rated for the same. § 4.

By the 59 Geo. III. c. 75. persons rated to the poor, though not parishioners, are entitled to vote according to the value of their premises; and also any clerk or agent of any corporation, rated for the relief of the poor, may vote in vestry.

By 58 Geo. III. c. 69. § 5. no person who shall have refused or neglected to pay any rate for the relief of the poor, which shall be due from, and shall have been demanded of him, shall be entitled to vote or to be present in any vestry.

As well the books hereby directed to be provided and kept for the entry of the proceedings of vestries, as all former vestry books, and all rates and assessments, accounts and vouchers of the churchwardens, overseers of the poor, and surveyors of the highways; and other parish officers, and all certificates, orders of courts and of justices, and other parish books, documents, writings, and public papers of every parish, except registry of marriages, baptisms, and burials, shall be kept by such person, and deposited in such place and manner as the inhabitants in vestry shall direct: and if any person in whose hands or custody the same shall be, shall wilfully or negligently destroy, obliterate, or injure the same, or suffer the same to be destroyed, obliterated, or injured, or shall, after reasonable notice and demand, refuse or neglect to deliver the same to such person, or to deposit the same in such place as shall by the order of any such vestry be directed, every person so offending, and being lawfully convicted thereof, on his own confession or on the oath of one witness, before two justices, upon complaint thereof to them made, shall, for every such offence, forfeit not exceeding 50*l.* nor less than 40*s.* as shall by such justices be adjudged; and the same shall be levied by warrant in such manner as poor's rates are by law to be levied, and shall be paid to the overseers, and be applied for the relief of the poor; but, nevertheless, every person who shall unlawfully retain in his custody, or shall refuse to deliver to any person authorized to receive the same, or who shall obliterate, destroy, or injure, or suffer to be obliterated, destroyed, or injured, any book, rate, assessment, account, voucher, certificate, order, document, writing, or paper belonging to any parish, or to the churchwardens, overseers of the poor, or surveyors of the high-

ways thereof, may in every such case be proceeded against in any of his majesty's courts, civilly or criminally, in like manner as if this act had not been made. § 6.

All provisions in this act contained in relation to parishes shall extend to all townships, vills, and places having separate overseers, and maintaining their poor separately; and all the directions herein contained in regard to vestries shall be applied to all meetings which may by law be holden of the inhabitants of any parish, township, vill, or place, for any of the purposes in this act expressed; and the notices required to be given of every vestry may, in places in which there shall be no parish church or chapel, or where there shall not be divine service, be given in such manner as notices of the like nature shall have been there usually given, or as shall be most effectual for communicating the same to the inhabitants. § 7.

Nothing in this act shall extend to alter the time of holding any vestry, parish, or town meeting, which is by the authority of any act required to be holden on any certain day, or within any certain time; nor shall any thing in this act extend to affect the powers of any vestry or meeting holden by virtue of any special act, of any ancient or special usage or custom, or to change the manner of voting in any vestry or meeting so holden. § 8.

Nothing in this act shall extend to any parish within London, § 9; or the borough of Southwark, § 10; and only to that part of the United Kingdom called England and Wales. § 11.

By 59 Geo. III. c. 12. for the better and more effectual execution of the laws for the relief of the poor, and for the amendment thereof, parishes are empowered to establish select vestries for the concerns of the poor, which vestries are not to exceed the number of twenty, nor less than five; and the rector, vicar, or other minister of the parish, and the churchwardens and overseers of the poor for the time being, together with the inhabitants who shall be nominated and elected as aforesaid (such inhabitants being first thereto appointed by writing under the hand and seal of one of his majesty's justices of the peace), shall be and constitute a select vestry for the care and management of the concerns of the poor of such parish: and any three of them (two of whom shall neither be churchwardens nor overseers of the poor) shall be a quorum; and when any inhabitant elected and appointed to serve in any such select vestry shall before the expiration of his office die or remove from the parish, or shall become incapable of serving, or shall refuse or neglect to serve therein, the vacancy which shall be thereby occasioned, shall, as soon as conveniently may be, be filled up by the election and appointment of some other substantial householder or occupier of such parish; and every such select vestry shall continue and be empowered to act from the time of the appointment thereof until fourteen days after the next annual appointment of overseers of the poor of the parish shall take place, and may be from year to year, and in any future year, renewed in the manner hereinbefore directed: and every such select vestry shall meet once in every fourteen days, and oftener if it shall be found necessary, in the parish church, or in some

other convenient place within the parish: and at every such meeting a chairman shall be appointed by the majority of the members present, who shall preside therein; and in all cases of equality of votes upon any question there arising, the chairman shall have the casting vote; and every such select vestry is empowered and required to examine into the state and condition of the poor of the parish, and to inquire into and determine upon the proper objects of relief, and the nature and amount of the relief to be given, and in each case shall take into consideration the character and conduct of the poor person to be relieved, and shall be at liberty to distinguish, in the relief to be granted, between the deserving, and the idle, extravagant, or profligate poor; and such select vestry shall make orders in writing for such relief as they shall think requisite, and shall inquire into and superintend the collection and administration of all money to be raised by the poor's rates, and of all other funds and money raised or applied by the parish to the relief of the poor; and where any such select vestry shall be established, the overseers of the poor are required, in the execution of their office, to conform to the direction of the select vestry, and shall not (except in cases of sudden emergency or urgent necessity, and to the extent only of such temporary relief as each case shall require, and except by order of justices in the cases hereinafter provided for) give any further or other relief or allowance to the poor, than such as shall be ordered by the select vestry. § 1.

When any complaint shall be made to any justice of the peace, of the want of adequate relief, by any poor inhabitant of any parish for which a select vestry shall be established, or in which the relief of the poor is or shall be under the management of guardians, governors, or directors appointed by virtue of special or local acts, such justice shall not proceed therein, or take cognizance thereof, unless it shall be proved on oath before him, that application for such relief hath first been made to and refused by the select vestry, or by such guardians, governors, or directors; and in such case the justice to whom such complaint shall be made may summon the overseers of the poor, to appear before any two of his majesty's justices of the peace, to answer the complaint; and if upon the hearing thereof it shall be proved on oath, to the satisfaction of the justices, that the party complaining is in need of relief, and that adequate relief hath been refused, it shall be lawful for such justices to make an order for such relief as they shall think necessary, provided that in every such order the special cause for granting the relief thereby directed shall be expressly stated, and that no such order shall be given for or extended to any longer time than one month: provided that it shall be lawful for any justice to make an order for relief in any case of urgent necessity, to be specified in such order, so as such order shall remain in force only until the assembling of the select vestry of the parish, or of such guardians, governors, or directors, as aforesaid, to which such case shall relate. § 2.

Minutes are to be kept of the proceedings of select vestries;

which minutes, as well as reports of their proceedings, are to be laid before the inhabitants in general vestry, in the months of March and October in every year. § 3.

Ten days notice, at the least, is to be publicly given, by the churchwardens and overseers, in the usual manner, of every vestry to be holden for the purposes of this act. § 4.

Every order for relief, in parishes not having a select vestry, is to be made by two or more justices, except in cases of emergency and urgent distress, when it shall be lawful for one justice to order such relief as the case shall require; but no such last-mentioned order shall entitle any person to claim relief more than fourteen days from the date of the order, nor shall the same have any force or effect after the next petty sessions to be holden within the hundred or other division or district in which the parish to which the same shall apply shall be situated. § 5.

The churchwardens have such special property in the organ, bells, parish books, bible, chalice, surplice, &c. belonging to the church, that, for taking them away, or for any damage done to any of them, they may bring an action at law; and therefore the parson cannot sue for them in the spiritual court. But the churchwardens have no right to, or interest in the freehold and inheritance of the church, which alone belongs to the parson or incumbent.

The seats of the church being fixed to the freehold, the churchwardens alone cannot dispose of them, nor the churchwardens and rector jointly, without the consent of the ordinary. Except by special custom, as in the city of London, where they are at the disposal of the churchwardens, under the controul of the parish; the parish being there obliged by the custom to repair the chancel as well as the body of the church. But as seats are erected for the more convenient attendance of divine service, and as the parishioners are at the expence of erecting them and keeping them in repair, if any of them be taken away, though they are fixed to the freehold, the churchwardens, and not the parson, shall bring the action against the wrong-doer.

Churchwardens cannot add any thing new to the fabric of the church, utensils, or church-yard, without the consent of the parishioners; and if such additions be required to be in the church, the bishop's licence is also necessary. But if repairs be necessary, the greater part of the parish will not bind the less; and if the major part will not consent that they should be undertaken, the churchwardens may repair without their consent, if, upon notice given, they refuse to meet, or, being met, refuse to make a rate. But if a church should fall down, the parishioners are not bound to rebuild it. But if a church be so out of repair, that it is necessary to pull it down, or too small to accommodate the inhabitants, the major part of the parishioners may make a rate either for new-building or enlarging, as there shall be occasion.

The parson, as the spiritual rector and lay impropiator, is bound by common right to repair the chancel, and is thereupon entitled to the chief seat therein, unless another has it by prescrip-

tion; yet he has not the disposal of the seats therein, but the bishop.

A seat, or priority in a seat, in the body of the church, may be prescribed for as belonging to a house, if it has been used and repaired, time out of mind, by the inhabitants of such house. But no person can claim a seat in the church by prescription, as appendant in or belonging to land; it must be laid as belonging to the house, in respect of the inhabitancy thereof. A seat cannot therefore be granted to a person and his heirs absolutely; for it does not belong to the person, but to the inhabitant.

By the 43 Eliz. c. 2. § 1. every churchwarden is an overseer of the poor, though every overseer of the poor is not a churchwarden.

Churchwardens have the care of the benefice during its vacancy. Having first taken out a sequestration from the spiritual court, they are to manage all the profits and expences of the benefice for him who shall next succeed. And, during the vacancy, they shall take care that the church be duly served by a curate approved by the bishop, whom they are to pay out of the profits of the benefice.

Churchwardens shall not suffer idle persons to remain either in the church-yard or church-porch during the time of divine service or preaching; but shall cause them either to come in or to depart.

They shall procure, or take care to have in the church, a large bible, a book of common prayer, a book of homilies, a decent communion table with proper coverings, the ten commandments set up at the east end, with other chosen sentences upon the walls, a reading desk, a pulpit, and a chest for alms, and all requisites for the communion service, and other ceremonies: all at the expence of the parish. And, at the charge of the parish, with the advice and direction of the minister, provide bread and wine for the communion.

They shall have a box, in which the register is to be kept, with three locks and three keys, two of such keys to be kept by them, and the other by the minister; and every Sunday they shall see that the minister shall enter therein all christenings, weddings, and burials, that have been the week before; and they (with the minister) shall subscribe their names at the bottom of every page; and they shall yearly, within a month after March 25th, transmit to the bishop a copy thereof for the year before, subscribed as before.

And such register being carefully preserved, is good evidence; and the falsifying of it is punishment at common law.

The pulpit of a church is exclusively the property of the parson of the parish for the time being; the churchwardens therefore cannot let any other minister have the use of it without his consent, not even though such other minister be appointed to preach by the ordinary.

The churchwardens, or the overseers, shall levy the penalty of 5*l.* for an incumbent not reading the common prayer once a month. And they shall collect money on charity briefs, on pain of 20*l.*

By 30 Car. II. c. 3. on certificate from the minister, they shall apply to the magistrates for conviction of offenders in not burying in woollen.

By the 12 Geo. II. c. 29. they, or the overseers, shall pay to the high constables the general county-rate out of the money collected for the poor.

They may present as often as they please, but are not obliged so to do above once a year, where it has so been used, and not above twice any where, except at the bishop's visitation.

The minister may present where the churchwardens neglect. But such presentment ought to be upon oath.

The churchwardens need not take a fresh oath upon each presentment they make; they do it by virtue of their oath of churchwardens.

If goods belonging to the church be taken away, and the churchwardens for the time being neglect to bring an action, the succeeding churchwardens may, by virtue of their office, bring an action against the aggressor.

All churchwardens at the end of their year, or within a month after at the most, shall, before the ministers and parishioners at a vestry, give up a just account of such money as they have received, and what they have particularly bestowed on reparation, and otherwise, for the use of the church. And, last of all, going out of their office, they shall truly deliver up to the parishioners whatsoever money or other things of right belong to the church or parish, which remain in their hands, that it may be delivered over by them to the next churchwardens, by bill indented.

If the churchwardens refuse to account, they may be prosecuted at the next visitation by the new churchwardens; or any of the parish who are interested may, by process, call them to account before the ordinary; or the succeeding churchwardens may have a writ of common law. And if they have disbursed more than they received, the succeeding churchwardens shall pay what is due to them, and charge it among other disbursements.

If the churchwardens have laid out the parish money imprudently, yet, if it be honestly laid out, they must be reimbursed.

If it is customary in a parish for a certain number of persons to have the government of it, and the account is given up to them; such custom is a good custom, and the account given to them a good account.

For disbursement of all small sums, not exceeding 40*s.* the oath of the churchwardens is held sufficient proof, but receipts must be produced for larger sums.

The allowance of the account may be by entering it in the church book of accounts, and having it signed by those of the vestry who allow the accounts.

After having faithfully accounted, and their account been allowed by the minister and the major part of the parishioners present, they shall not be obliged to account again, unless some fraud in their accounts be afterwards discovered.

If any action be brought against any churchwardens, or persons called sworn-men executing the office of churchwardens, for any thing done by virtue of their office, they may plead the general issue, and give the special matter in evidence; and if a verdict be given for them, or the plaintiff shall be nonsuit, or discontinue, they shall have double costs.

By the 3 W. III. c. 11. § 12. in all actions for the recovery of any sum of money received by churchwardens, &c. the evidence of the parishioners, other than such as receive alms, shall be admitted.

All suits instituted by the churchwardens for the use of the parish must be in their joint names, as the corporation consists of both.

OVERSEERS OF THE POOR.

Peers of the realm, members of parliament, clergymen, dissenting ministers, popish priests, barristers at law, physicians, surgeons and apothecaries, attorneys, and other officers of the courts at Westminster, aldermen of London and other places, prosecutors of felons to conviction, servants of members of parliament, soldiers, militia-men, &c. are exempted from serving the office of overseer of the poor.

By 43 Eliz. c. 2. and 13 & 14 Car. II. c. 12. the churchwardens of every parish, and such four, three, or two substantial house-keepers as shall be thought meet (having respect to the proportion and greatness of the parish), to be nominated yearly in Easter week, or within one month after, under the hand and seal of two or more justices of the peace of the same county, and dwelling in or near the said parish or division, (one of whom shall be of the quorum), shall be called overseers of the poor of the same parish.

Mayors, bailiffs, or other head officers of towns corporate and cities, being justices of the peace, shall have the same authority within their jurisdiction as justices of the county within their's. And aldermen of London shall have a like authority within their ward.

By 59 Geo. III. c. 12. § 6. justices of the peace may appoint any person who shall be assessed to the relief of the poor in any parish, and shall be a householder resident within two miles from the church or chapel of such parish, or, where there shall be no church or chapel, shall be resident within one mile from the boundary of such parish, to be an overseer of the poor thereof, although the person so to be appointed shall not be a householder within the parish: provided, that no person shall be so appointed, unless he shall have consented to it.

And by section 7. the inhabitants of any parish may nominate and elect an assistant overseer or overseers of the poor, and may determine and specify the duties, and may fix a yearly salary for the execution of the said office; and any two of his majesty's justices of the peace may appoint such person or persons so nominated and elected, and every person appointed assistant overseer is authorized and empowered to execute all the duties of the office, in like manner as the same may be executed by an ordinary overseer of the poor: and the inhabitants may require and take security for the faithful execution of his or their office.

And by 17 Geo. II. c. 38. if an overseer die, remove, or become insolvent, justices or head officers may put another in his stead.

Further, if the justices refuse or neglect to appoint overseers in due time, a *mandamus* may be had to compel them. And persons aggrieved at such appointment are to appeal to the sessions.

By 43 Eliz. c. 2. and 13 & 14 Car. II. c. 12. the churchwardens and overseers of every parish, township, and village, shall, from time to time, with the consent of two justices (one of whom shall be of the quorum), dwelling near the parish or division, make order for setting to work all such children whose parents are not able to maintain them, and also for employing all such other persons as have no ordinary and visible trade, or other means of honestly providing for themselves; and also shall raise, weekly or otherwise, by taxation on the inhabitants, a convenient stock of hemp, wool, thread, iron, and other necessary stuff, to set the poor to work; and also competent sums of money for the relief of the lame, impotent, blind, old, and others, being poor and unable to work, and also for putting out poor children to be apprentices.

The overseers and churchwardens may, by leave of the lord of the manor, build, on any waste in the parish, cottages and dwelling-houses for such poor; and by 3 Car. I. c. 1. they may, with the consent of two justices, set up any trade for employing the poor.

By 9 Geo. I. c. 7. the churchwardens and overseers may, with the consent of the major part of the inhabitants, in vestry, or other public meeting, purchase or hire any house in the same parish, township, or place, and also contract with any person for the lodging, maintaining, or employing the poor; and keep, maintain, and employ them, and take the benefit of their work and service, for the use of the poor in general. And by the 45 Geo. III. c. 54. no contract for maintaining the poor shall be valid, unless the person with whom the same is made shall be resident in the parish contracting, or where the poor shall be maintained; nor unless one householder shall be surety for the performance of the contract: but, on the removal of contractor, such removal shall not vacate the security. And by 24 Geo. II. c. 4. no spirituous liquors shall be sold or used in any workhouse, or other house for the parish poor; and every master of such poor-house shall procure a copy of § 13, 14, 15, of the said act, to be printed or written, and hung up in one of the most public places of the said house, and renew the same from time to time, on pain of 40s. to be levied by warrant of a justice, one half to the informer, and the other half to the poor.

Where any parish, town, or township, shall be too small to purchase or hire such houses, &c. two or more such parishes may, with the approbation of any justice dwelling in or near the parish, unite in hiring such houses for the purposes aforesaid.

By 59 Geo. III. c. 12. any parish not having a workhouse, or where the workhouse is insufficient, the churchwardens and overseers, by the direction of the inhabitants in vestry assembled, may build a suitable workhouse, or alter and enlarge any messuage or tenement, and may purchase or take on lease any ground within

the parish for the purpose of such building, or for enlarging any such other messuage or tenement. § 8.

Also, by the direction of the inhabitants in vestry, and with the consent of two justices, they may sell and dispose of any work-house, or any other houses or tenements belonging to any parish, which shall be found to be insufficient or unfit for the purpose, with the scite thereof, and the out-houses, offices, yards, and gardens; and may apply the produce towards the purchase or building of a new workhouse, or towards the payment of any money to be borrowed under this act. § 9.

Also, they may purchase or hire any suitable and convenient house or houses, building or buildings, for the receiving of the poor, in any adjoining parish, with the consent of two or more justices; provided that no such house or building shall be situate more than three miles from the parish for which the same shall be purchased or hired. § 10.

Every house and building so purchased or hired shall be deemed to be part of the parish on behalf of which the same shall be purchased or hired. § 11.

The churchwardens and overseers of the poor, with the consent of the inhabitants, may take into their hands any land or ground which shall belong to such parish, or to the poor thereof, or may purchase, or hire, or take on lease, any suitable portion of land within or near to such parish, not exceeding twenty acres; and may employ on such land such poor persons, and pay them reasonable wages for their work. § 12.

And they may let any portion or portions of such land to any poor and industrious inhabitant of the parish, to be occupied and cultivated. § 13.

But no sum exceeding one shilling in the pound shall be raised, expended, or applied, in any one year for the above purposes, unless the major part of the inhabitants and occupiers assessed to the relief of the poor, in vestry assembled, shall consent thereto, nor until two-third parts in value of all the inhabitants and occupiers assessed as aforesaid (whether present or not) shall have signed their consent thereto in the vestry or parish book. § 14.

But in case the inhabitants of any parish shall consent that a greater sum than one shilling in the pound will raise shall be expended in one year for all the aforesaid purposes, the churchwardens and overseers (after the rate or rates at or amounting to one shilling in the pound shall have been actually levied and applied for such purposes, or some of them) may raise any additional sum or sums by loan, or annuity on any life or lives not being under the age of fifty years, or for any certain term not exceeding fifteen years, so as the whole sum to be raised shall not be more than five shillings in the pound upon the true annual value of the property which shall in such parish be assessed to the poor's rates, (every proposal for any such annuity being first stated to and approved by the inhabitants and occupiers of such parish in vestry assembled); and the churchwardens and overseers of the poor may, in the names and on the behalf of the inhabitants, sign and

execute securities for the money borrowed, and for the annuities granted; and, by every such security, charge the produce of the future poor's rates with the repayment of the principal sum and the interest thereof, or with the payment of the annuity. § 15.

But no greater rate than one shilling in the pound shall be charged on future rates, unless with consent of two-thirds in value of the proprietors of premises. § 16.

And if any person who shall have been permitted to occupy any parish or poor-house, or any other tenement or dwelling belonging to or provided by or at the charge of any parish for the habitation of the poor thereof, or who shall have unlawfully intruded himself or herself into such house, tenement, or dwelling, or into any house, tenement, or hereditament belonging to such parish, shall refuse or neglect to quit the same, and deliver up the possession thereof, within one month after notice and demand in writing, signed by the churchwardens and overseers, or the major part of them, shall have been delivered to the person in possession, or in his or her absence affixed on some notorious part of the premises, any two of his majesty's justices of the peace may issue their summons to the person against whom such complaint shall be made, to appear before them; and such justices are empowered to proceed to hear and determine the matter of such complaint; and if they shall find and adjudge the same to be true, then by warrant to cause possession of the premises in question to be delivered to the churchwardens and overseers. § 24.

Section 25 contains similar provisions, to compel the surrender of land appropriated to the use of the poor.

By 5 Geo. I. it is enacted, that if any person for whom relief is prayed shall refuse to be lodged, &c. in such houses or places, he shall not be entitled to receive any relief from the parish. But the 36 Geo. III. c. 23. provides, that the overseers, with the consent of the parishioners, or the approbation in writing of a justice, may (notwithstanding such refusal to be lodged as aforesaid) give relief to the industrious poor at their own homes, if such indulgence be rendered necessary by illness or other cause.

Also, where any wife or children shall be left by the father, or husband, or mother, without support, the churchwardens or overseers, by order of two justices, may seize so much of the goods, and receive so much of the rents and profits of the husband, father, or mother, as may be sufficient to enable the parish to provide for them; and the churchwardens and overseers shall be accountable to the quarter sessions for the money they shall so receive.

By 3 Geo. IV. c. 40. persons who threaten to run away and leave their wives and children to the parish, or being able to work and maintain themselves and families, refuse so to do, whereby they become chargeable to the parish shall be deemed idle and disorderly persons, and be committed to the house of correction accordingly.

By 59 Geo. III. c. 12. § 29. whenever it shall appear that any poor person might, but for his extravagance, neglect, or wilful

misconduct, have been able to maintain himself, or to support his family, it shall be lawful for the overseers of the poor to advance money weekly or otherwise, as may be requisite, to the person applying, by way of loan only, and to take his receipt for an engagement to repay every sum advanced (for which no stamp duty shall be required): any two justices may, upon the application (within one year after any such loan or loans) of one or more of the overseers of the poor, summon the person to whom any money shall have been so advanced; and if it shall appear to them that such person is able, by weekly instalments or otherwise, to repay the whole or any part of the money so advanced, it shall be lawful for such justices to make an order for the repayment of the whole or of any part of such money, at such time and times, and in such proportions and manner, as they shall see fit; and upon every default of payment, by their warrant to commit such person to the common gaol or house of correction, for any time not exceeding three calendar months. § 29.

By 3 W. & M. c. 11. the churchwardens and overseers shall cause to be kept a book, wherein shall be registered the names of all persons receiving contributions from the parish, with the day and year when they were first admitted to have relief, and also the occasion which reduced them to that necessity. And once in every year, in Easter week, (or oftener if need be), the churchwardens and overseers shall meet the parishioners at vestry, or otherwise, where such book shall be produced and inspected, and a fresh list (if they shall see occasion) be made of persons then requiring relief; and further, no other person than those in such list contained shall be entitled to relief, without the warrant of a justice of the peace for that purpose.

By 9 Geo. III. c. 37. if any churchwarden or overseer, or other person authorized by them to make payment to the poor, shall wilfully make any such payment in base or counterfeit money, or in any other than lawful money of Great Britain, he shall forfeit not more than 20s. nor less than 10s.

By 6 Geo. II. c. 31. if any single woman shall be delivered of a bastard child, which shall be likely to become chargeable to any parish or extra-parochial place, or shall declare herself with child, and that such child is likely to be born a bastard, and shall, upon oath before a justice, charge any person with having gotten her with child, such justice, on application made to him by the overseers of the poor of such parish, or one of them, or by any substantial housekeeper of any extra-parochial place, shall cause such person to be apprehended, and commit him to gaol or house of correction, unless he shall give security to indemnify such parish or place against any charge in respect of such child, or to appear at the next general quarter sessions, and abide by the order which shall be there made.

But if such woman shall die, be married before delivery, or miscarry, or shall not have been with child, such person shall be discharged: and, upon applying to a justice, such justice shall summon the overseers or householders aforesaid, to shew cause

why he should not be discharged; and if no order be made within six weeks after such woman shall have been delivered, &c. he shall be discharged accordingly.

By 12 Geo. III. c. 82. if any woman shall be delivered of any bastard child in any hospital, or place of public reception for pregnant women, the keeper, or person having the management thereof, shall, four days before she shall be discharged, give notice to the churchwardens or overseers of the parish where such hospital, &c. shall be situated; and such overseer or churchwarden shall attend there at the time specified (and so from time to time as often as may be necessary, if the woman should then be unfit to be removed), and convey such woman before some justice of the peace, to be examined, relative to her place of settlement; and such examination shall be delivered in writing to the overseer or churchwarden, and by him deposited amongst the parish books and papers.

If such woman be to be removed to any other parish within twenty miles of the hospital, &c. such other parish shall be chargeable with the expences thereof.

By 43 Eliz. c. 2. the churchwardens and overseers of the poor, or the major part of them, may, with the assent of any two justices of the peace (one of whom must be of the quorum), bind out as apprentices, where they shall see convenient, all such poor children of their parish, whose parents are not able to provide for them: such children, if male, to be bound till the age of twenty-one, and if female, till the age of twenty-one, or marriage.

The churchwardens and overseers are not restrained to bind such children to inhabitants of the parish, but may apprentice them to any other persons, wherever resident, who are willing to take them. And by 1 Jac. I. c. 25; 22 Jac. I. c. 28; and 3 Car. I. c. 4. all persons to whom the overseers and churchwardens, or the major part of them, shall bind any children apprentice by virtue of the said act of 43 Eliz. may keep the same as apprentices.

It has been held, that the inhabitants are not merely at liberty to take, but may be compelled to accept such poor apprentices. And though a person live out of the parish, yet if he occupy land within it, he may be compelled to take such apprentices; and where two or more persons hold land in coparcenary, some of whom occupy the same, and others not, it has been determined that the latter as well as the former are bound to take apprentices.

By 8 & 9 W. III. masters to whom they are so bound shall provide for them according to the indenture of apprenticeship confirmed by the justices, and shall execute a counterpart thereof under a penalty of 10*l*.

By 42 Geo. III. c. 46. the overseers of the poor of every parish, township, or place, shall keep a book at the expence of the parish, &c. and enter the name of every child who shall be bound out by them as an apprentice, together with the several other particulars, according to the schedule annexed; and every such entry shall be produced before, and (if approved) be signed by the two justices of the peace; and if any overseer shall refuse or neglect, to keep

such book, or to make such entry, or destroy, or permit to be destroyed, any such book, or shall wilfully obliterate or alter any entry, so that the same shall not be a true entry of the particulars, or make a false entry or permit the same to be done; or shall not produce such book before such justices, or not deliver such book to his successor in office within fourteen days after the appointment of such successor; or if any such successor shall refuse to receive the same when offered; every such person so offending shall, for every offence, forfeit 5*l.* to be applied to the use of the poor of the place for which such offender shall be overseer; or in default of payment such offender shall be committed to gaol or house of correction, for any time not exceeding one month. Any person may inspect such books in the hands of the overseer, and take a copy of any entry, upon payment of 6*d.*

And if any such apprentice shall be assigned or bound over to any other master or mistress, the overseer, or parties to the assignment, shall insert in the said book the name and residence of the master or mistress to whom such apprentice shall be assigned, together with the other particulars mentioned in the schedule.

By 2 & 3 Ann. c. 6. churchwardens and overseers of the poor, with the approbation of two justices or head-officers of cities and towns corporate, may bind out boys of the age of ten years or upwards, who or whose parents shall be chargeable to the parish, to be apprentices to the sea service, to any of his majesty's ships, or any owner or master of ships, until such boys shall attain the age of twenty-one years; and the age of every such boy, as taken from the register of the baptism (a copy of which shall be given, attested by the minister or curate, without fee), shall be mentioned in his indentures. And the churchwardens and overseers shall pay with such boy, on his binding, the sum of 50*s.* to the master, to provide clothing and bedding.

The officers taking any poor apprentices to be so bound, shall witness the counterpart of the indentures, and transmit the same to the churchwardens or overseers; who shall send the indentures to the collector of the customs at any port to which such master or owner of any ship may belong, in order that he may enter the same, which he shall do without fee.

Churchwardens and overseers may also, with the consent of two justices, or of the parents, bind any boy of the age of eight years, who is chargeable to the parish, or whose parents are so, to be apprentice to any chimney-sweeper, until he attain sixteen years.

Persons to whom such poor apprentices shall be bound, may, by the assent and direction of two justices, assign them over to other masters.

By 43 Eliz. c. 2. the churchwardens and overseers of every parish, or the greater part of them, shall, with the consent of two justices (one of whom shall be of the quorum) dwelling in or near the parish or division, raise weekly, or otherwise, by taxing, in such sums of money as they shall think fit, every inhabitant, parson, vicar, and other and every occupier of lands, houses, tithes impropriate, propriations of tithes, coal-mines, or saleable under-

woods in the parish, a sufficient stock of flax, hemp, wool, yarn, and other necessary ware and stuff, to set the poor to work, and also money for the relief of the lame, impotent, old, blind, and others, being poor and not able to work, and also for putting out poor children apprentice, and generally to do all other things as to them shall seem meet.

By 33 Geo. III. c. 8. and 34 Geo. III. c. 47. if any person chosen to serve in the militia, or any serjeant, corporal, drummer, or fifer, serving therein, shall, when embodied or drawn out into actual service, leave a family unable to support themselves, such family shall be paid out of the poor's rates such weekly sums as a justice shall think fit to order.

By 59 Geo. III. c. 12. pensions for service in the navy, army, &c. are to be assigned in certain cases for the indemnity of parishes giving relief to such pensioners; and justices may order payment to overseers of the pensions of persons leaving their families chargeable to the parish.

Justices are empowered to order payment of seamen's wages, engaged in the merchant-service, to the overseers of any parish to which the wives and families of such seamen may become chargeable; which wages are to be paid by the owner, ship's husband, or agent, and if not paid, to be levied by distress.

By 17 Geo. II. c. 38. overseers of the poor, within every township or place where there are no churchwardens, shall execute all the acts and powers concerning the relief of the poor and other matters relating to them, the same as churchwardens and overseers jointly may do by that or former statutes.

But overseers cannot make a rate for reimbursing their predecessors what they expended whilst in office. And they are not bound to lay out money before they have received it; if they do so, they must themselves make a new rate for the relief of the poor, and out of it reimburse themselves. Nor can they borrow money for the purposes of the poor.

But if the overseers, while in office, have themselves made a rate for any of the above purposes, and their year expire before they have collected sufficient of it to repay themselves the money they may have expended, their successors are empowered to get in the same, and reimburse their predecessors.

As the overseers' accounts are to be settled at the end of every year, if they be appointed for several successive years, and do not make a rate at the end of each year to reimburse themselves what they have expended in such year, they cannot in any subsequent year make a rate for that purpose; and the consent of the inhabitants is by no means necessary to the making of a rate, the churchwardens and overseers, with the assent of two justices, having complete authority to raise any sum they shall think fit.

By 17 Geo. II. c. 3. the churchwardens and overseers, and other persons authorized to take care of the poor, shall give public notice, in the chapel or church of the parish or place, of every rate for the relief of the poor which shall have been allowed by the justices, on the next Sunday after it shall have been so allowed.

It is also enacted, that the churchwardens and overseers of the poor shall cause copies of all rates made for the relief of the poor to be entered in a book to be by them provided, and shall attest the same by putting their hands thereto: and such books shall be preserved, that all persons assessed, or liable to be assessed, may resort thereto; and the same shall be delivered over from time to time to the succeeding churchwardens and overseers, as soon as they enter into their offices. Churchwardens and overseers neglecting the above particulars shall forfeit not more than 5*l.* nor less than 20*s.* to the use of the poor.

And the churchwardens and overseers shall permit every inhabitant to inspect such rates at all reasonable times, on payment of 1*s.* and shall also, if demanded, give copies thereof, on payment of 6*d.* for every twenty-four names. And if any churchwarden or overseer shall refuse to let any inhabitant inspect such rates, or neglect or refuse to give copies thereof as aforesaid, he shall forfeit 20*l.* to the party aggrieved, to be recovered by action of debt.

The rate must be made on all the rateable inhabitants in equal proportions, according to their respective properties and possessions. And the rate is to be made according to the improved value of the estate, and not according to the rent which the occupier may pay for it.

By 17 Geo. II. c. 38. where any person shall come into or occupy any house, land, &c. out of which any person assessed shall have removed, or which at the time of making a rate was empty, every person so removing from, and every person so coming into, or occupying the same, shall be liable to pay such rate only in proportion to the time they occupied the same, in like manner as if the person so removing had not removed, or the person coming in had been originally rated; which proportion is to be ascertained, in case of dispute, by any two justices of the peace; and if they make it unequal, it must be corrected by appeal to the sessions.

Further, if it appear to any two justices of the peace that any parish is unable to levy within itself sufficient money for the purposes of that act, they are empowered to rate such sum as may be necessary upon any other parish or place (whether parochial or not) within the hundred, as the justices at their quarter sessions may upon any parish, &c. within the county; and, in making this rate, they may tax particular persons only, or assess one gross sum upon the whole parish at their discretion, and leave it to the churchwardens and overseers to levy the same.

And in regard to rates for relief of the poor of incorporated districts, it is enacted by 36 Geo. III. c. 10. that it shall be lawful for the directors and acting guardians of the poor within any district incorporated for the relief of the poor, whenever the average price of wheat in Mark-lane, London, for the quarter preceding their general meeting, shall exceed the average price of those years from which the average amount of the poor's rate was taken, upon passing the several incorporating acts, to assess such district in such sums as they may deem necessary for the poor of the current

quarter, and for paying the interest of money borrowed and debts incurred since January, 1795, notwithstanding the sum so assessed shall exceed the assessments limited by the act of incorporation; provided the sums to be assessed, after 1st Jan. 1795, shall not exceed, in any one year, double the amount of the sums at the time of passing this act raised by the said incorporating act.

And by 42 Geo. III. c. 74. which recites that the 22 Geo. III. c. 83. declaring that in case any money should be borrowed for the building any poor-house or work-house, or purchasing land necessary to be used for that purpose, the assessments for the relief of the poor should continue at the same rate they were when such poor-house or work-house was first established, until the debts so contracted, and the interest thereof, should be fully discharged, had been found highly burdensome and oppressive to such parishes on account of the late high price of provisions, it is therefore enacted, that the guardians of the poor of any parish, who have erected any poor-house or work-house under the powers of the said recited act, shall, with the consent of the several persons to whom the same shall be due and payable, yearly and every year pay off and discharge any part of the money borrowed under the powers of the said recited act, not being less than one-twentieth part thereof, besides the interest which may be payable on the sum undischarged; and in case such sum to be paid off shall not in any one year be sufficient to discharge any one of the notes for 50*l.* issued pursuant to the direction of the said act for securing the money, the same shall from time to time remain in the hands of the overseer of the poor of such parish, until it amount to a sufficient sum to pay off and discharge any of the said notes.

All persons, inhabitants of a parish, and not themselves coming under the denomination of the poor, are liable to be rated for the relief of the poor. Thus, the person appointed to the care of a charitable institution in the parish was held to be rateable in respect of a house assigned for his habitation; for that being part of the emoluments of the appointment, he was considered as a beneficial occupier. But it is otherwise where a person resides in a house belonging to the charitable institution merely as a servant, employed for the purpose of the charity.

Though a person dwell in a different county, yet if he occupy lands in the parish, he is, in respect of the poor's rates, deemed an inhabitant, and therefore rateable.

No persons whatsoever are, in respect of their landed property, so privileged as to be exempt from this contribution.

In assessing rates, it is the occupier only of the premises who is to be assessed, and not the lessor or landlord who receives the rent.

But by 59 Geo. III. c. 12. from and after the 1st of January, 1820, the inhabitants of any parish in vestry assembled are empowered to resolve and direct, that the owner or owners of all houses, apartments, or dwellings in such parishes, being the im-

mediate lessor or lessors of the actual occupier or occupiers, which shall respectively be let to the occupiers thereof at any rent or rate not exceeding twenty pounds nor less than six pounds by the year, for any less term than one year, or on any agreement by which the rent shall be reserved or made payable at any shorter period than three months, shall be assessed to the rates for the relief of the poor, for or in respect of such houses, apartments, or dwellings, and the out-houses and curtilages thereof, instead of the actual occupiers; and the inhabitants so assembled in vestry may from time to time rescind, renew, vary, and amend every such resolution and direction, as they shall see occasion, so as no such resolution or direction shall extend to assess or charge the owner of any house, apartment, or dwelling, which shall, with the out-houses and curtilages thereof, be let at a greater rent than twenty pounds, or less than six pounds, § 19.

The goods of occupiers of such houses as aforesaid may be distrained for rates to the amount of the rent actually due; and every occupier who shall pay any such rate or rates, or upon whose goods or chattels the same shall be levied, may deduct the amount of the sum which shall be so paid or levied out of the rent by him or them payable; and such payment shall be a sufficient discharge to every such occupier for so much of the rent payable by him as he shall have paid, or as shall have been levied on his goods and chattels, of such rate, and for the costs of levying the same. § 20.

Every person receiving or claiming the rent of any such house, apartment, or dwelling, for his or her own use, or receiving it for the use of any corporation aggregate, or of any landlord or lessor who shall be a minor, under coverture, or insane, or for the use of any person who shall not be usually resident within twenty miles, from the parish in which any such house, apartment, or dwelling, shall be situated, shall be deemed and taken to be, and shall be rateable as the owner thereof. § 21.

Persons rated as owners may appeal; and may vote in vestries.

No owner, not being an occupier, to be rated in places where the right of voting for members to serve in parliament depends on the rating. § 23.

A person is rateable for the whole of the house in which he dwells, though he use or inhabit but a part of it. But where a house is divided into several distinct tenements, and inhabited by different families, or where two several houses have but one entrance, they may be rated separately.

As to the species of property liable to be rated—A farmer is not taxable to the poor for his stock; though a tradesman is taxable for his stock in trade.

A private building, always used as a chapel, and by contract never to be used for any other purpose, is, if a profit be made of it, rateable to the poor.

A Quaker meeting-house, of which no profit is made, is not rateable.

In the case of *K. v. Carlton, Clerk, and another*, 20 Geo. III.

it was determined that fish are tithable by custom; and the proprietors of such tithes are liable to be rated to the relief of the poor.

Tolls taken in a river are rateable.

Tolls taken in corporations are rateable.

K. v. the Proprietors of Staffordshire and Worcestershire Navigation, M. 40 Geo. III. A navigation act empowered the proprietors to take so much per mile per ton for all goods carried along the canal; held that they were rateable to the poor for the tolls in the different parishes where the tolls became due, that is, where the respective voyages finished; though for their own convenience they were authorized to collect the same where they pleased, and did in fact collect them in other parishes.

Ships are rateable to the poor in the parish to which they belong.

In the case *K. v. St. Nicholas, Gloucester*, E. 23 Geo. III. a machine-house for weighing waggons, &c. was held rateable.

Hospital lands are chargeable to the poor, as well as others; for no man, by appropriating his lands to an hospital, can discharge or exempt them from taxes to which they were subject before, and throw a greater burden upon his neighbours. But respecting the hospital itself, it was determined, in the case of *St. Luke's hospital for lunatics*, M. 1 Geo. III. that such hospitals are exempted, excepting only those parts of them which are inhabited by the officers belonging to the hospital; as the chaplain, physician, and the like.

An alms-house, wholly occupied by objects of charity or their attendants, and of which no profit is made, though the absolute property of it is in the person who gives the alms, has no legal occupiers, and is not an object of taxation under the poor laws.

The profits arising from a mineral spring, when let together with land at a gross rent, are to be considered as part of the produce of the land, and are therefore rateable to the poor.

Where the commanding officer in barracks had distinct apartments allotted to him, one in particular for transacting the business of the regiment, and the others fitted up for the accommodation of himself and his family, who resided there with him, containing, among others, a kitchen, wash-house, and coach-house, together with a stable, yard, and garden; it was held that he was rateable to the relief of the poor for the same, having a beneficial enjoyment of them, beyond his necessary accommodation as an officer for the purpose of public service.

Money in a man's house or possession is not rateable.

The stock of a common brewer cannot be sufficiently ascertained to be rated to the relief of the poor.

A slate work (or, as improperly called, a slate mine) is rateable.

In *K. v. Gardiner*, T. 14 Geo. III. it was adjudged, that the master and fellow of Catharine Hall, in Cambridge, as a corporation, are liable to be rated.

A parson who lets to each parishioner his own tithes is properly the occupier, and ought to be rated.

But though coal mines are expressly mentioned in the statute, lead mines are not rateable.

Iron mines are not rateable to the relief of the poor.

Where a corporation were seised in fee of lands, which by custom were annually meted out under their controul by aleet jury, according to a certain stint, to such of the resident burgesses who chose to stock the same, they paying 19s. 4d. to each of the other burgesses who did not stock; held that the burgesses who so stocked were tenants in common of the land so occupied by them, and as such occupiers were liable to be rated for the same.

Where a coal mine, becoming unproductive, ceases to be worked, the lessee is no longer liable to be rated for it to the relief of the poor, though he be still bound by his covenant to pay the rent reserved to his landlord. But otherwise where the mine is itself productive, though it be worked to a loss by the lessee, after deducting the proportion of the gross value of the produce reserved to the owner.

By 17 Geo. II. c. 37. where there shall be any dispute in what parish or place improved wastes, and drained and improved marsh lands lie, and ought to be rated; the occupiers of such lands, or houses built thereon, tithes arising therefrom, mines therein, and saleable underwoods, shall be rated to the relief of the poor, and to all other parish rates, within such parish or place which lies nearest to such lands; and if, on application to the officers of such parish or place to have the same assessed, any dispute shall arise, the justices at the next sessions after such application made, and after giving notice to the officers of the several parishes and places adjoining to such lands, and to all others interested therein, may hear and determine the same on the appeal of any person interested, and may cause the same to be equally assessed, whose determination therein shall be final.

As to the method of collecting the poor's rates, by 43 Eliz. c. 2. and 17 Geo. III. c. 38. it is provided, that overseers and church-wardens, or any of them, may levy, by distress and sale of goods, all sums and arrearages of poor rates assessed on persons refusing to pay the same; and such distress may lawfully be had, not only in the place for which the assessment may have been made, but in any other place in the same county, &c. Persons aggrieved may appeal to the next quarter sessions.

But it has been determined, that before the rate can be levied by distress, the party must be summoned before the justice granting the warrant. And in case no distress can be had, the party may be committed to the common gaol until the said rates be paid.

An overseer distraining for poor's rates under a justice's warrant, being an officer within the protection of 24 Geo. III. c. 44. cannot be proceeded against for any irregularity, till the party injured has required to peruse the warrant, and has been refused. Nor shall any action for such satisfaction be maintained, if tender of amends has been previously offered for the injury done. And if any justice refuse to grant a warrant of distress for rates, he may

be compelled thereto by *mandamus* from the Court of King's Bench, unless such rate were neglected to be duly proclaimed as before directed, in which case the justice is not bound to grant such warrant.

It is enacted by 17 Geo. II. c. 38. that the churchwardens and overseers of every parish, township, and village, shall, within fourteen days after overseers shall be appointed for the year ensuing, deliver unto such succeeding overseers a just account in writing, fairly entered in a book to be kept for that purpose, and signed by them, of all sums by them received, or rated on the inhabitants (though the sum be not received), and also of all goods, chattels, stock, and materials, in their hands, or in the possession of any poor of the said parish, to be wrought or worked, and of all moneys paid by the churchwardens and overseers during their office; and, finally, of all other things relative to their said office, proper to be transmitted to their successors.

Churchwardens and overseers shall deliver over to their said successors all moneys, goods, and other things, in their hands; which account shall be verified by oath (or affirmation, if the said officers be Quakers) before a justice of the peace.

The outgoing overseers must deliver over to their successors the books of the poor's rate, as being public books of account which the parishioners have a right at all times to inspect. A book of such accounts shall be preserved by all churchwardens and overseers, in some public or other place in every parish, township, &c. and they shall permit any person assessed, or liable to be assessed to the poor, to inspect the same at all seasonable times, upon the payment of sixpence for such inspection; and the said churchwardens and overseers shall, on demand of any person so rated, or liable to be rated, forthwith give copies of such accounts, at the rate of sixpence for every three hundred words, and so in proportion for any greater or less number of words.

If any overseer shall refuse or neglect to give up such accounts on oath, or shall refuse or neglect to pay over to his successors all moneys and other things of the parish in his hands, as before directed, he shall be committed to the gaol till he comply, or be indicted and fined.

If an overseer shall remove from the parish, he shall, before such removal, deliver over to some other overseer, or to the churchwarden, such his accounts verified as aforesaid, together with all moneys, rates, books, papers, and other things belonging to the parish, under the like penalty of imprisonment.

In case of the death of any overseer during his office, his executors or administrators shall, within forty days after his decease, pay over unto some other overseer of the parish, or the churchwarden, out of the assets of the deceased, all moneys received by him by virtue of his office, and not therein disbursed, before any other debts be paid; and shall also deliver over, in like manner, all other things belonging to the parish, which shall come to their possession as executors or administrators aforesaid.

Though an overseer should become a bankrupt, the money he has collected for the use of the poor will not be affected, he holding such money in the capacity of a trustee for the parish; nor will his bankruptcy discharge him from his office of overseer.

Persons unjustly charged by the accounts of the overseers may (on giving reasonable notice to such overseers) appeal to the next quarter sessions. And, after such appeal has been determined, any two justices may, if the said appeal be adjudged against the overseers, enforce the payment of the balance due to the parish; and if such justice refuse or neglect to enforce payment, he may be compelled so to do by *mandamus* from the Court of King's Bench. And it is not in the discretion or power of the vestry to dispense with the payment of such balance, not even though they may wish him to retain it for the purpose of paying a bill they may have engaged to answer; nor can an overseer retain any part of the money in his hand to pay an assistant in the discharge of his duty, even though such assistant was appointed, and his salary fixed, with the express consent of the parish; for if two overseers be not enough, more may be appointed.

In protection of the lawful authority of overseers under the said statute of 43 Eliz. it is provided, that if any action of trespass be brought against them for any act of their duty, they may plead the general issue, or make avowry, cognizance, or justification; and if the matter be determined in favour of the defendants, they shall recover treble damages, with costs of suit; which damages are to be assessed by the jury, and the court are to treble such damages, and give costs.

If a person assessed to the poor's rate refuse to pay, and, on the overseers going to make a distress, the party voluntarily deliver him goods to the officer, the overseer shall have treble damages in an action of trespass afterwards brought against him by such party; but the costs shall not be trebled. And on the plaintiff being nonsuited, the overseer shall have a writ of inquiry to ascertain his damages. So after a nonsuit in replevin, when defendants avow as overseers. So on a verdict for defendant, if jury omit to assess the damages.

By 7 Jac. I. c. 5. it is enacted, that in any action brought against overseers or churchwardens, or others executing their orders, every such person may plead the general issue, and give the special matter in evidence; and if the verdict be in his favour, the judge before whom the matter shall be tried shall allow the defendant double costs. But, in order to entitle him to double costs, the defendant must, at the time of trial, obtain a certificate of the judge, that the action was brought against him for something done in execution of this act.

By 21 Jac. I. c. 12. actions on the case, trespass, battery, or false imprisonment, brought against overseers or other persons acting under them, shall be laid in the county where the fact

was done, and not elsewhere: and if the plaintiff shall not prove the fact committed within the county, the defendant shall be found not guilty, and shall have all the remedies of the above statutes.

But, to entitle an overseer to double costs under the above statutes, the judge must certify that he was acting in the execution of his office. Yet, on a special verdict, when it appears that the act was done by the defendant in virtue of his office, the master must tax double costs, though there have been no certificate by the judge.

By 17 Geo. III. c. 38. § 8. where any distress shall be made for money justly due for relief of the poor, the distress shall not be deemed unlawful, nor the parties trespassers, for any want of form in the appointment of the overseer, nor shall the parties distraining be deemed trespassers *ab initio* on account of any irregularity afterwards done by them; but the party injured may recover full satisfaction for the special damage in an action of trespass, or on the case, at the election of the plaintiff. And by § 9. of the same statute, it is enacted, that if the plaintiff shall recover in such action, he shall have his full costs, and all the like remedies for the same as in other cases of costs.

By § 10, no plaintiff shall recover for any such irregularity, if tender of amends have been made by the party distraining before action brought. And it has been held that this act extends to give costs to overseers on an indictment against a man for refusing to obey an order of sessions respecting the payment of a poor rate.

By 24 Geo. II. c. 44. it is enacted, that no action shall be brought against any constable, or other officer, or persons acting in his aid, for any thing done in obedience to any warrant of a justice of the peace, until demand of the perusal and copy of such warrant has been made or left at the usual place of his abode, by the party or his attorney, and the same has been refused or neglected for the space of six days after such demand. It has been determined, that overseers of the poor, though not expressly named, are officers within the protection of the statute. After such demand, if any action shall be brought against him, without making the justice who granted the warrant a defendant with him, the jury shall, on such warrant being produced and proved at the trial, find a verdict for the defendant, notwithstanding any defect of jurisdiction or authority in such justice to grant the same. Therefore overseers cannot be sued in trespass for levying a poor rate by distress, without joining the magistrate who granted the warrant in the action.

But it has been held, that if replevin be brought against an overseer, on a distress taken for nonpayment of the poor-rate, the justices who issued the warrant need not be made parties to the action.

If such action be brought jointly against such justice and such officer, or person acting in his aid, then, on proof of such warrant, the jury shall find for such officer or his assistant, notwithstanding such defect of jurisdiction as aforesaid: and if the verdict shall be given against the justice, the plaintiff shall recover his costs against such justice, to be so taxed as to include all costs which the plaintiff is liable at law to pay him for whom the verdict shall be found.

And, lastly, no action shall be maintained against any officer, or person acting under his directions, unless it be commenced within six calendar months after the cause of the action shall arise.

By 43 Eliz. c. 2. every churchwarden or overseer of the poor, who shall be negligent in the execution of his office, shall forfeit for every default the sum of 20s. to be expended for the use of the poor of the parish.

But the penalty for not meeting in the church cannot be inflicted on overseers of extra-parochial places, for there they have no church to meet in. Nor can an overseer be judged guilty of absentsing himself from monthly meetings, until he has had personal notice of his appointment.

If negligence be shewn by a churchwarden, the penalty is to be levied by the overseer; and if by the overseer, the penalty is to be levied by the churchwarden: the same to be levied by distress, under warrant of two justices (one of the quorum), or of the head-officers of corporate places; and if no distress can be had, the offender to be committed to prison till the fine be paid.

By 17 Geo. II. c. 38. if any churchwarden or overseer of the poor shall neglect to obey the directions of that act, or shall act contrary thereto, in any case where no penalty is expressly provided; he shall, for every such offence, forfeit a sum not exceeding 5*l.* nor less than 20*s.* at the discretion of the justice, to be levied by distress and sale as aforesaid. But information of offences under this act must be made within two months after committed. And further, by 33 Geo. III. c. 55. justices at the petty sessions are empowered to impose upon churchwardens, overseers, &c. for neglect of duty, or disobedience to warrants, any reasonable fine not exceeding 40*s.*

The Court of King's Bench will grant an information against overseers for not receiving a pauper regularly sent to them by an order of two justices.

If an overseer make an alteration in a poor-rate, after it has been allowed by two justices, with the approbation of such justices, he shall not be punished by information.

The court will not grant an information against overseers for procuring the marriage of a pregnant pauper with a view to burden another parish. And yet, it seems, they may be indicted.

If, on a dispute respecting a rate for relief of the poor, the matter be referred, and in the mean time the overseer borrow money on his own notes for the relief of the poor, and he make

no rate to reimburse himself, the lender may recover the money lent in an action for money had and received.

By 55 Geo. III. c. 137. no churchwarden, or overseer of the poor, or any other person having the management of the poor, shall furnish or supply, for his or their own profit, any articles or provisions for the support of the poor, under the penalty of 100*l.* except there should not be a person competent or willing to undertake it in the parish.

PARISH SETTLEMENTS.

By statutes passed in the reign of Car. II. settlements were declared to be gained by birth, by residence, by apprenticeship, or by service; afterwards notice of inhabitancy was required; subsequent provisions allowed other circumstances of notoriety to be equivalent to such notice; and those circumstances have from time to time been altered, enlarged, or restrained, whenever the experience of new inconveniences suggested the necessity of a remedy. The law of settlements may now therefore be reduced to the following general heads: 1. By birth; 2. By parentage; 3. By marriage; 4. By apprenticeship; 5. By hiring and service; 6. By residence on a tenement of the value of 10*l.* a year; 7. By estate; 8. By paying public taxes; 9. By serving a public office. And should any poor person become chargeable to the parish where he resides, without having gained a settlement by either of those means, he will be removable to his own proper parish, by order of two justices.

1. *By birth.*—Wherever a child is born, that is *primâ facie* the place of its settlement, but not *conclusively* so: for, with respect to a legitimate child, whenever the settlement of its parents can be discovered, the same is the settlement of the child.

The place of its birth, however, is generally the settlement of a bastard child; but this rule is not without exceptions.

If the birth be procured in any particular parish by contrivance or fraud; as where an unmarried woman being with child, and near her time of delivery, is conveyed to an adjoining parish and there delivered, the child will belong to the parish where the woman previously dwelt.

Also, if a woman be removed by order of a removal to another parish, and be there delivered during an appeal against such order, the child, in case such order of removal be quashed, will not be settled where born, but in the place from whence the mother was removed.

By 17 Geo. II. c. 5. if any woman wandering and begging, shall be delivered of a bastard child in a place to which she does not belong, and thereby become chargeable, and the churchwardens and overseers convey her to a justice, the child shall not be settled where born, but belong to the settlement of the mother.

So, likewise, when a bastard is born in a house of correction, or county gaol, the child belongs to the parish of the mother, and not to the parish where born.

By 13 Geo. II. c. 82. no bastard child born in any lying-in hospital shall thereby gain a settlement. And by 20 Geo. II. c. 36. bastard children born in any house of industry of any district incorporated for the relief of the poor, shall not therefore be settled in the parish where such house may be situated. In all which cases the child belongs to the parish or place of its mother's legal settlement.

2. By parentage.—The father's settlement is the settlement of the children, when it can be found out. The death of the father does not alter the settlement of the child; for if the father die before the child is born, the child shall be settled where the father was settled before his death.

Where a father gains a second settlement after the birth of his child, that settlement is immediately communicated to the child, and the child may be sent to the place of his father's settlement, without ever having been there before.

A child is not emancipated, so as to lose the benefit of any settlement which his father may gain, until he comes of age, or marries, or till he has gained a settlement in his own right, or till he has contracted a relation inconsistent with the idea of his being part of his father's family.

If a woman marry again to a man settled in another parish, her children by her former husband must go with her for nurture; yet they are no part of her second husband's family, and therefore gain no settlement in the parish where the father-in-law is settled.

But if a widow, by renting 10*l.* a year, gain a new settlement, her children are settled with her.

It seems now agreed, that a legitimate child shall necessarily follow the settlement of its parents, as a nurse-child, or as part of the family, only till it shall be seven years of age; and that, after that age, it shall not be removed as part of the father's family, but with an adjudication of the place of its own last legal settlement, as being deemed capable at that age of having gained a settlement of its own. For the 5 Eliz. c. 5. § 12. enacts, that a child of seven years of age may be bound apprentice to a shipwright, fisherman, owner of a ship, or other person using the trade of the seas: and by the 17 Geo. II. a vagrant's child of that age may be put out an apprentice by the justices; and when he shall have resided and lodged in a parish for forty days under the indenture, he will thereby have gained a settlement. Hence it is apparent, therefore, a person may gain a settlement in his own right at the age of seven years and forty days.

3. By marriage.—A woman marrying a husband who has a known settlement, shall follow the husband's settlement.

But where the husband has no legal settlement, the wife retains that which she had before the marriage; for she ought not to be put in a worse condition than she was before her marriage.

If the husband be abroad, and the place of his settlement not

known, the wife may be removed to her maiden settlement, though it is uncertain whether the husband be alive or dead.

A wife can gain no settlement separate and distinct from her husband during the coverture: as in the case of *Aythorp Roding*, and *White Roding*, M. 30 Geo. II. The wife, after the husband was run away, went to live upon a copyhold of her husband's, where he had never resided; and it was held, that though she might not be removed from thence, yet (her husband being living) she could not thereby gain a settlement.

Though it is generally true, that no settlement shall be good which is brought about by fraud, yet there are exceptions; for if a marriage take effect by such a stratagem as the following, the settlement is good, though the contrivers are liable to prosecution. Overseers were indicted for a conspiracy, in giving a small sum of money to a poor man of another parish, to induce him to marry a poor lame woman of their own parish, and so conspiring to settle the woman in the other parish, where the husband was settled. By the court:—If there is a conspiracy to let lands at 10*l.* a year to a poor man, in order to gain him a settlement, or to make a certificate man a parish officer, or to send a woman pregnant with a bastard child into another parish to be delivered there, in order to charge the parish with the child; these are certainly crimes indictable. But this indictment was quashed, for want of averment that the woman was legally settled in the parish relieved by her marriage.

If a feme-covert be removed by an order of two justices from A to B, describing her as “widow,” and there be no appeal against it, it is conclusive, not only as to her settlement, but also as to that of her husband.

4. *By apprenticeship*.—If a person be bound apprentice by indenture, wherever he continues forty days in the service of his master or mistress, there such apprentice gains a settlement; and where any person serves the last forty days of his apprenticeship, that is the place of his legal settlement.

It is not absolutely necessary that forty days' residence must be successively to gain a settlement: as in the case of the *K. v. Cirencester*, an apprentice was bound in the parish, who lived there off and on for three quarters of a year. Exception was taken, that this was no settlement, since he might not inhabit for forty days together. But, by the court, that is not necessary, and the order for making it a settlement was confirmed.

If an apprentice be turned over during his apprenticeship, or serve another master, so it is by the consent of his master, he gains a settlement in the parish where he served the remainder of his time.

If a master take an apprentice, and during the boy's time the master run away, and the boy hire himself to another for a year, such serving gains no settlement, he not being of a capacity to hire himself. It would be otherwise, had it been by consent of the master, or had his indentures been cancelled.

The settlement of an apprentice does not always depend on the settlement of the master, as in the case of *St. Bride's* and *St. Saviour's*. A woman who was settled in the parish of *St. Saviour*, with her apprentice by indenture, took a lodging in the parish of *St. Bride*, and there continued above forty days with her apprentice, who served her there. This was held, by the court, to be a settlement of the apprentice at *St. Bride's*, though the mistress had no settlement there.

An apprentice may gain a settlement, whilst his master, not renting 10*l.* a year, gains none. In such case, the master being removed may apply to the justices to compel the apprentice to go with him.

A settlement is not acquired by binding and serving, but by inhabiting, which can only be where the party lodges.

By the 12 Ann. st. 1. c. 18. § 2. any person who shall be an apprentice bound by indenture to any person residing under a certificate in any parish, and shall not afterwards have gained a legal settlement in such parish, such apprentice, by virtue of such apprenticeship, shall not gain any settlement in such parish.

6. *By hiring and service*.—By the 3 W. III. c. 11. it is enacted, that if any unmarried person, not having child or children, shall be lawfully hired into any parish or town for one year, such service shall be adjudged and deemed a good settlement therein. But the 8 & 9 W. III. c. 30. declares that no such person so hired shall be adjudged to have a good settlement in any such parish or township, unless such person shall continue and abide in such service during the space of one whole year.

But by the 12 Ann. st. 1. c. 18. § 2. if any person shall be a hired servant with any person who did come into, or shall reside in any parish, township, or place, by means of a licence or certificate, and not afterwards having gained a legal settlement in such parish, township, or place, such servant shall not gain any settlement in such parish, township, or place, by reason of such hiring or service, but shall have his settlement as if he had not been a hired servant to such person.

All hiring for a few days short of a year, for the purpose of avoiding a settlement, will be considered as fraudulent; and the service will not be allowed to make a good settlement. Less than forty days' residence in any parish will not gain a settlement; but if the contract be for a year, and the service be performed (suppose at sea, or in distant journeys), the residence need not be forty days successively; it is sufficient if within the year he reside forty days in the whole.

In the case of *Holland v. Bradley*, E. 21 Geo. III. it was determined, that when a person has resided part of the year in one parish, and part in another, at different times and intervals, making, when added together, more than forty days in each, his settlement is in the parish where he lodged the last night.

If there is an inhabitancy, under a hiring for a year, of forty days, at any intervals throughout the year, in any number of

parishes, wherever the last day's inhabitancy shall happen to be, such will connect with any prior inhabitancy in the course of the year; and if, throughout the whole year, the whole will there amount to forty, in that place the settlement attaches.

If a man hired for a year marry, after having served half a year, the marriage does not hinder the service; if the man perform the service, he gains a settlement.

Where there is a hiring for a year, and a service for a year, and a continuance under the same service, it is sufficient to gain a settlement; and such settlement must be in the parish where it was performed the last forty days.

A general hiring, without any particular time agreed upon, is construed to be a hiring for a year, and therefore sufficient. But not a hiring by the piece, or as a weekly labourer.

Where nothing is said in a contract of hiring about time, but a reservation of weekly wages, it is a weekly hiring only; therefore where the contract is for the servant to live with his master, the latter finding him in board and lodging, and paying him 2s. 6d. per week, no settlement can be gained by more than a year's service under such contract.

It is not the terms of the hiring, but the intention, that is the criterion; for though a servant be hired for so much per week, yet if it be understood at the time that he is to continue for the year, if approved of, it is a hiring for the year.

When a servant, after having been some time with a person, agrees to become his servant from the time he first came to him at certain wages, such hiring is held not to be sufficient within the statute, so as to gain a settlement by a year's service from his first coming.

By the 9 Geo. III. c. 31. the servants in the Magdalen Hospital for the reception of penitent prostitutes, shall not, by their service in such hospital, gain a settlement in the parish where such hospital is situated.

By the 13 Geo. II. c. 22. for confirming the powers given by charter to the governors of the hospital for the maintenance of exposed and deserted young children, it is provided, that no child, nurse, or servant, received or employed in such hospital, shall, by virtue thereof, gain any settlement in the parish where such hospital shall be situated.

6. *By residence, and renting a tenement of 10l. a year.*—

By the 59 Geo. III. c. 50. no person shall acquire a settlement in any parish or township maintaining its own poor in England, by reason of his or her dwelling for forty days in any tenement rented by such person, unless such tenement shall consist of a house or building within such parish or township, being a separate and distinct dwelling-house or building, or of land within such parish or township, or of both, *bonâ fide* hired by such person at and for the sum of 10l. a year at least for the term of one whole year; nor unless such house or building shall be held, and such land occupied, and the rent for the same actually paid, for the term

of one whole year at the least by the person hiring the same; nor unless the whole of such land shall be situated within the same parish or township as the house wherein the person hiring such land shall dwell and inhabit.

7. By estate.—A person having an estate of his own, though under 10l. shall gain a settlement thereby under the 13 & 14 Car. II. c. 12.

Having land in a parish will not make a settlement; but a person living in a parish where he has land will gain one without notice: for the act never meant to banish men from the enjoyment of their own lands. But residence upon the same estate is not necessary, provided it be within the parish.

A person may not be removed from his own estate, though not settled thereby, be the value ever so small, or let him come to it in what manner soever.

If an estate descend to a certificated person, it gains him a settlement, because it is by operation of law, and not by an act of his own.

A person entitled in A, and afterwards an estate falls to him in B; this will not entitle the parish of A to remove him thither: if he had been settled in B, he would have been irremovable.

A man may gain a settlement by living forty days on his own estate, though he afterwards sell the said estate.

By the 9 Geo. I. c. 7. no person shall be deemed to acquire any settlement in any parish or place by virtue of any purchase of an estate or interest in such parish or place, whereof the consideration of such purchase does not amount to 30l. *bonâ fide* paid, for any longer or farther time than such person shall inhabit in such estate, and shall be then liable to be removed to such parish or place where he was last legally settled before the said purchase and inhabitancy therein.

A person who is resident on an estate granted to him for lives, in consideration of two guineas fine, and one shilling rent, cannot gain a settlement by forty days' residence, as on his own estate, under statute 9 Geo. I. the consideration being under 30l.

8. By paying public taxes.—By 3 W. III. c. 11. § 6. if any person who shall come to inhabit in any town or parish, shall be charged with, and pay his share towards the public taxes or levies of the said town or parish, he shall be adjudged to have a legal settlement in the same.

The land tax is a parish tax within the act.

But, by the 9 & 10 W. III. c. 11. persons residing under a certificate shall gain no settlement by being rated to and paying any such levies, taxes, or assessments.

By the 43 Geo. III. c. 161. persons paying any of the assessed taxes shall not thereby gain a settlement. One reason may probably be, because they do not thereby contribute any thing to the public stock of the parish.

By the 9 Geo. I. c. 7. persons assessed to the scavengers' rate, or to the repairs of the highways, and duly paying the same, shall not be deemed to be settled thereby.

The 35 Geo. III. c. 101. § 4. provides that, after the passing of that act, no person who shall come into any parish shall gain a settlement by being rated to any tenement under 10*l.* a year value; and this extended to persons who were in the parish at the time of passing the act.

9. *By executing a public office.*—By the 3 W. c. 11. § 6. any person who shall come to inhabit in any town or parish, who shall for himself, and on his own account, execute any public and annual office or charge in the said town or parish during one whole year, shall be adjudged to have a legal settlement in the same, though no notice in writing be delivered and published.

The 9 & 10 W. c. 11. also enacts, that no person coming into any parish by certificate shall be adjudged by any act whatsoever to have procured a legal settlement in such parish, unless he shall really and *bonâ fide* take a lease of a tenement of the yearly value of 10*l.* or execute some annual office in such parish, being legally placed in such office.

The office must, however, be an unconditional appointment for one whole year certain, and be executed during such complete period, in order to entitle the officer to gain a settlement under such appointment.

With respect to what shall be deemed an office or charge within the statute, it has been determined, that the office of tithing-man (the principal, but not the deputy tithing-man), borsholder, warden for a borough, parish clerk (even though not licensed by the ordinary), sexton, bailiff or aleconner, hog-ringer (if an annual office for the whole parish), collector of land tax or other parliamentary duties, governor of the workhouse, will each of them gain a settlement in the parish for which they are served.

A schoolmaster is not legally placed in his office till he has subscribed, before the bishop, the declaration of conformity to the liturgy of the church of England, and is licensed before him.

A curate officiating in a parish at an annual stipend is not such an officer as to be entitled to a settlement under 3 Will. III.

Nor an exciseman, whose salary was paid by the collector, or without any deduction from his salary.

A person serving the office of constable as deputy, does not thereby gain a settlement. He must be legally placed in his office, by taking the oaths which belong to it, and it must appear to the court how he came into his employment or office.

The appointment of a master of a workhouse by the parish officers and vestry, pursuant to the 9 Geo. I. c. 7. which enables the parish officers, parishioners, &c. to contract with any person for the management of the poor in the workhouse, (and who did contract with the pauper to manage the poor in the workhouse, and teach the children to spin, &c. at a yearly salary, and after some years service dismissed him at a quarter's notice) is not a public annual office or charge within the 3 W. & M. c. 11. § 6. the executing of which for a year will confer a settlement.

If the settlement of a pauper, by either of the means we have enumerated, cannot be ascertained, he must be supported by that parish in which he may happen to become chargeable.

Thus, a child deserted and left by its parents, was held to be maintainable where found.

And so foreigners and their children, if they have gained no place of settlement, and are unable to get a living, must be supported by the parish where they happen to become chargeable.

But in all cases where a pauper's settlement can be ascertained, whenever he becomes chargeable to any parish or place where he may be resident or sojourning, he is removeable to the parish to which he belongs.

Formerly, by the 13 & 14 Car. II. c. 12. on complaint made by the churchwardens and overseers of the poor, within forty days after any person should come to reside in any parish, on any tenement under 10*l.* a year, being *likely to become chargeable*, two justices (one of the quorum) might remove him to the place where he was last legally settled, unless he gave sufficient security for the discharge of the parish, to be allowed of by the said justices.

And, to prevent indigent persons from obtaining settlements in a clandestine manner, it was enacted by the 1 Jac. II. c. 17. that such forty days should be reckoned from the time of his delivering notice, in writing, of the place of his abode and the number of his family to one of the churchwardens or overseers of the poor; and, by the 3 W. III. c. 11. from the publication of such notice in church.

Hence arose the practice of *certificates*, to enable poor persons to remove into another parish for the better maintenance of themselves and families. The 8 & 9 W. III. c. 30. enacted, that it shall be lawful for any person to go into any place to work, and there to reside, if he shall at the same time procure and deliver to the churchwardens or overseers, where he shall come to inhabit, a certificate under the hands and seals of the churchwardens, &c. of any other parish, to be attested by two or more credible witnesses, thereby acknowledging the person mentioned in such certificate to be an inhabitant legally settled in that parish; and every such certificate, having been allowed of and subscribed by two justices of the county or liberty from whence the same shall come, shall oblige the said parish to receive and provide for the person mentioned in the certificate, together with his or her family, as inhabitants of that parish; and if at any time they should happen to become chargeable, or be forced to ask relief of the parish to which they shall have so come, it shall then and not before be lawful for such person and his or her children (though born in that parish, and not having otherwise acquired a legal settlement there) to be removed, conveyed, and settled in the parish from which such certificate was brought.

And by the 9 & 10 Geo. III. c. 11. it is enacted that a person thus coming into any parish by certificate shall not be ad-

judged by any act whatsoever to have procured a legal settlement in such parish, unless he shall really and *bonâ fide* take a lease of a tenement of the yearly value of 10*l.* or execute some annual office in such parish, being legally placed in such office.

And by 12 Ann. c. 18. if any person residing in a parish by certificate shall take an apprentice, or hire a servant, such apprentice or such servant shall not be adjudged thereby to gain any settlement there.

And by the 33 Geo. III. c. 54. (authorizing persons to form themselves into societies for the purpose of raising a supply for the mutual relief of the members in old age, &c.) it is provided, that no member of any such society coming to reside in any parish, with a certificate from the stewards, presidents, wardens, or treasurers thereof, or two of them, attested by one witness, acknowledging the person to be a member of the said society, shall, during the time he shall be a member thereof, be removable to his own proper parish, until he shall become actually chargeable, or forced to ask relief to the parish to which he shall so come.

But now by the 35 Geo. III. c. 101. so much of the act of 13 & 14 Car. II. as authorizes justices to remove any person likely to become chargeable, is repealed; and it is declared, that from thenceforth no poor person shall be removed as aforesaid, *until such person shall have become actually chargeable* to the parish or place in which he shall inhabit.

And it is also by the same act declared, that no person shall from thenceforth be enabled to gain any settlement in any parish by delivery and publication of notice in writing.

But, by § 6. of the same statute, every person who shall have been convicted of *larceny* or other *felony*, or have been adjudged a *rogue and vagabond*, or *idle and disorderly person*, or a person of evil fame, or a reputed thief, and every *unmarried woman with child*, shall be deemed and taken to be actually chargeable, within the meaning of the act; to the parish where they shall reside, and may be removed to their place of settlement.

An unmarried woman may be removed to the place of her settlement, on account of her being pregnant, under the 35 Geo. III. c. 101. § 6. even though she be residing under a certificate from her own parish.

The 35 Geo. III. c. 101. § 2. after enabling justices to suspend orders of removal of poor persons, and to order the expences thereby incurred to be defrayed by the pauper's parish, and to direct the charges to be levied by warrant of distress, enacts, that if the parties against whom it is issued, are out of the jurisdiction of the justice granting the warrant, it shall be indorsed by some other justice within whose jurisdiction they are. This is peremptory on the latter, on request made.

By 59 Geo. III. c. 12. § 28. any justice of the peace may take in writing the examination on oath of any person having a wife or child, who shall be a prisoner in any gaol or house of correction, or in the custody of the keeper of any such gaol or house of cor-

rection, or who shall be in the custody of any constable or other peace-officer, touching the place of his or her last legal settlement; and such examination, being signed by such justice, shall be received and admitted in evidence as to such settlement before any justices, for the purpose of any order of removal, so long only as the person so examined shall continue a prisoner.

By 59 Geo. III. c. 12. any two justices of the peace are authorized, upon the complaint of the churchwardens and overseers of any parish, that any person born in Scotland, or in Ireland, or in either of the Isles of Man, Jersey, and Guernsey, which shall have become chargeable to such parish, by himself or herself, or his or her family, to cause such person to be brought before them, and to examine such person, and any other witness or witnesses, on oath; touching the place of the birth or last legal settlement of every such person, and to inquire whether he or she, or any of his or her children, hath or have gained any settlement in that part of the United Kingdom called England: and if it shall be found by such justices, that the person so brought before them was born in Scotland or Ireland, or in either of the Isles of Man, Jersey, and Guernsey, and hath not gained any settlement in England, and that he or she hath actually become chargeable to the complaining parish, by himself or herself, or his or her family, then such justices shall, by a pass under their hands and seals, in the form or to the effect prescribed by the act of 17 Geo. II. c. 5. to amend the laws relating to rogues and vagabonds (*mutatis mutandis*), cause such poor person, his wife, and such of his or her children so chargeable as shall not have gained a settlement in England, to be removed to the place of his or her birth or last legal settlement, in the manner by the said act directed for the removal of rogues and vagabonds to Scotland and Ireland, and the Isles of Man, Jersey, and Guernsey; and all constables and other officers, and all masters of vessels, are required to convey every person so to be passed in the manner directed for the conveyance of rogues and vagabonds. § 33.

Scotch and Irish vagrants may be removed with or without being whipped or imprisoned. § 34.

By the 5 Geo. IV. c. 71. § 3. when any lunatic or dangerous idiot, whose settlement cannot be ascertained, shall be by the order of two justices confined in any lunatic asylum, it shall be lawful for any two justices of the county at any time to examine into the legal settlement of such lunatic or dangerous idiot; and, if satisfactory evidence can be obtained, to adjudge the last legal settlement of such lunatic to be in such parish or place as may on such evidence appear him to be his legal settlement, and forthwith to make an order on the overseers of the poor of such parish or place to pay such weekly sum to the treasurer of such asylum as shall have been fixed by the visiting justices as a fit rate for the maintenance, medicine, clothing, and care of lunatics confined in such asylum.

If the overseers of the poor shall feel themselves aggrieved by any such order as aforesaid, it shall be lawful for them to appeal

at the next general quarter sessions of the peace for the county in which such lunatic asylum shall be situated; and the justices at such sessions shall hear and determine the matter of such appeal, as in cases of appeals against orders of removal, and award such costs to either party as shall seem just and reasonable; and in case the settlement of any lunatic respecting whom such order shall have been made, shall be there determined not to be in the parish or place on which such order shall have been made, then such costs shall be paid by the treasurer of the county or united counties at whose expence such lunatic asylum shall have been erected.

And whereas visiting justices are authorized from time to time to fix a certain weekly rate to be paid for each person confined in any lunatic asylum, which rate may be sufficient to defray the whole expence of the maintenance and care, medicines and clothing requisite for such person, and the salaries of the officers and attendants; and whereas it is by the 48 & 49 Geo. III. enacted, that the justices acting for the division of the county where such parish for which any pauper lunatic has been directed and conveyed to such lunatic asylum shall be situated, shall from time to time make order on the overseers of such parish, for the payment of all reasonable charges of conveying such poor person to such asylum, and for the weekly payment to the treasurer thereof of such sums as the visiting justices of such asylum shall have fixed; and whereas it is expedient that better provision should be made for the recovery of such sums; it is therefore further enacted, that if the overseers for the time being of such parish, upon whom such order shall be made, shall, for the space of twenty days after due notice of such order, refuse or neglect to pay the sums so ordered to be paid, the same shall be recovered by distress and sale of the goods of such overseers so refusing or neglecting, or any of them; by warrant under the hands and seals of any two justices of any such respective counties. § 5.

CONSTABLES.

Constables are of three sorts: high constables, petty constables, and special constables.

The office of *high constable* is not confined to any particular town or parish, but extends generally to the whole hundred for which he is appointed. He is chosen by the court leet of the franchise or hundred over which he presides, or by the justices at their quarter sessions, and is removeable by the same authority that appoints him.

The *petty constable's* jurisdiction extends to the particular parish, borough, or liberty for which he is chosen.

The *special constable's* jurisdiction is the same as the petty constable's, and he is in fact appointed only on particular emergencies, to assist the former in his duties.

By 1 Geo. IV. c. 37. justices of the peace are authorized, where it shall appear by the information on oath of five respectable house-

holders, that any tumult, riot, or felony has taken place, or is likely to take place, and may reasonably be apprehended, such justices are to call upon, nominate, and appoint, by precept in writing under their hands, any householders or other persons (not legally exempt from serving the office of constable) residing within their respective divisions, or the neighbourhood thereof, to act as special constables, for such time and in such manner as to the said justices shall seem fit and necessary for the preservation of the public peace, and for the prevention and suppression of any tumult, riot, or felony; and the said justices are to administer to such person so appointed the usual oaths administered by law to all special constables. § 1.

And in case any person (not legally exempted as aforesaid) so called upon, nominated, and appointed by such justices, shall neglect or refuse to take upon himself the office, and to act as such special constable, such person so neglecting or refusing shall be liable to the same fines, penalties, and punishments, as persons refusing to take upon themselves the office of constable are now by law subject to. § 3.

The justices assembled at the general or quarter sessions, where special constables shall have been called out as aforesaid, may order such reasonable allowance for trouble and expences, to be made to any person so called out, as shall seem fit; which allowance the treasurer of such county or place is to pay.

The proper business of a constable is to prevent offences against the laws, to detect and apprehend offenders, and generally to preserve the peace of the district over which he is appointed.

One of their principal duties (arising from the statute of Winchester, which appoints them) is to keep watch and ward in their respective jurisdictions. Ward (*custodia*, or guard) is chiefly applied to the day-time, and intends the apprehension of rioters and robbers on the highways; the manner of doing which is left to the discretion of the justices of the peace and of the constable. Ward is properly applicable to the night only; and it begins when ward ends, and ends when that begins, that is to say, from sun-setting to sun-rising.

The constable may, at his discretion (regulated however by the custom of the place), appoint watchmen to keep the peace, and apprehend rogues, vagabonds, &c. by night, who, being his deputies, have for the time being the same authority as the constable himself.

The constable is also the proper officer of the justice of the peace, and bound to execute his warrants; and therefore, where a justice is authorized by the legislature to convict a man of any offence, and to levy the penalty by warrant of distress, without its being said by whom such warrant shall be executed, the constable is the proper officer to serve the warrant, and may be indicted for disobedience.

He is also to attend on coroners, in order to execute their warrants; and likewise on the judges of assize at the gaol delivery, and

justices at the general and special sessions, for the like purpose. But he may execute such warrants, &c. directed to him by deputy, if, on account of indisposition, absence, or other special cause, he cannot conveniently do it in person.

The general duty of constables appointed in London (as specified in their oath) is to keep the king's peace to the utmost of their power; to arrest affrayers, rioters, and breakers of the peace, whom they are to carry to the house of correction, or to the compters of one of the sheriffs; and, in case of resistance or escape, to make outcry upon them, and pursue them from street to street, and ward to ward, till they are taken; to search for common nuisances in their respective wards, on being requested by scavengers; to assist the beadle and raker in collecting their salary and quarterage; to present to the lord mayor and ministers of the city all defaults relating to the city ordinances; to certify, monthly, into the courts of the mayor the christian and surnames of all freemen deceased, and also of the children (being orphans) of such freemen, together with (by the articles of the wardmote inquest) the christian and surnames, place of abode, profession, or trade, of all persons who shall newly have become inhabitants within their respective precincts, and keep a roll thereof: for which purpose they are to make inquiries, at least once a month, as to what persons are come to lodge or sojourn there; and if they find that there are any new comers, who were sent from any other ward for bad living, or any misdemeanours, shall require them to give sureties for their good behaviour, which if refused, warning is to be given them and their landlords that they depart, and on refusal they may be imprisoned, and the landlord fined a year's rent of the house or apartments they inhabited.

They are also, by 10 Geo. II. c. 22. to certify to the lord mayor and common council the names of all such persons as shall interrupt them in the discharge of their duty.

Sworn attorneys, and other officers whose attendance is required in the courts of Westminster-Hall, are not obliged to serve and execute any inferior parish office.

The president of the commonalty and fellowship of physick in London, and the commons and fellows of the same, shall not be chosen constables in the city or suburbs of London. But in the case of *Moises v. Thornton*, T. 39 Geo. III. it was determined that the mere production in court of a diploma of a Doctor of Physick, under seal of one of the universities, is not in itself evidence to shew that the party named in the diploma is entitled to that degree.

By the 5 Hen. III. c. 6. and 18 Geo. II. c. 16. surgeons in London shall be exempted from this office. The exemption also extends to barber-surgeons, approved and admitted according to the statute of 3 Hen. VIII. c. 11. so that they exceed not twelve persons.

By the 6 & 7 W. c. 4. apothecaries in London, and within seven miles thereof, being free of the Company of Apothecaries, shall be exempted from this office. And the statute enacts, that all

persons using the art of an apothecary in the country, who have served as apprentices for seven years, according to the 5 Eliz. shall also be exempted.

An alderman of London, by reason of his necessary attendance on the courts, is not compelled to be a constable.

By the 1 W. c. 18. § 11. teachers or preachers, in holy orders, in a congregation legally tolerated, shall, from the time of their subscription and taking the oaths, be exempted from the office of constable.

If a gentleman of quality, or a practising physician, be chosen constable of a town which has sufficient persons besides to execute this office, and no special custom concerning it, perhaps he may be relieved by the King's Bench; but it seems that even custom cannot exempt fitting persons from serving the office of constable, where there are not sufficient besides them to execute it.

The prosecutor of a felon to conviction shall be discharged from the office of constable.

A person serving for himself as a private man in the militia shall, during the time of such service, be exempted from the office of constable. And, by 26 Geo. III. c. 107. no serjeant, corporal, or drummer of any militia, or any private, from his enrolment till his discharge, shall be compelled to serve as a peace or other parish officer.

It has been contended, that a custom in a town, that the inhabitants shall serve the office of constable by turns, is good; and that the objection, that by such means it may come to a woman's turn to serve is of no force; since she is allowed to appoint a deputy, or procure one to serve for her, who shall be considered as a proper officer.

By the 31 Geo. II. c. 17. no person within the city or liberty of Westminster, who is of the age of sixty-three years or upwards, shall be compelled to serve the office of constable, or to procure any one to serve in his room.

The ancient officers of any of the colleges in the two universities are also exempted from this office.

It was said by Ch. J. Holt, 6 *Mod.* 41. that no person who keeps a public house ought to be a constable.

By 12 W. c. 2. and 1 Geo I. c. 4. no person born out of the kingdoms of England, Scotland, or Ireland, or the dominions thereof, (except he be born of English parents), shall be capable of serving any office of trust, civil or military, not even though he be naturalized or denizenized: on which statute it has been determined that he is ineligible to serve the office of constable, it being a civil office of trust.

But, generally speaking, every housekeeper, inhabitant of the parish, and of full age, is liable to fill the office of constable.

A petty constable sworn into office, and executing it by deputy, thereby discharges a certificate, and acquires a settlement.

The law requires that every person should have honesty to execute his office truly, without malice, affection, or partiality; secondly, he should have knowledge to understand what he ought

to do; thirdly, ability, as well in substance or estate, as in body, that so he may intend and execute his office diligently, and not, through impotency of body, or want, neglect his duty. And if he shall be chosen constable who is not thus qualified, he may be discharged of his said office, and another fit man appointed.

The high constable is usually chosen at the sessions by a majority of the justices of the division; and petty constables may of common right be chosen by the homage or jury in the court-leet; or, if there be no court-leet, by the sheriff in his tourn. And it being settled that his election is in the people, it is customary in many parishes for the petty constables to be chosen by the inhabitants at a vestry, and sworn in before a justice of the peace.

As a constable is a principal officer of the peace, the justices of the peace have, ever since the institution of their office, taken upon them, as conservators of the peace, to nominate and swear in constables, when they have been neglected to be appointed by the leet. It has also been held that they may appoint constables, even in privileged places, and where there has been none for fifty years before; as in the Tower Hamlets, they chose five where there had formerly been but one, and it was determined that the appointment was lawful.

Not only where the leet has neglected to choose a constable, but where unable or unfit persons have been chosen, the justices of the peace have interfered and removed them.

If a constable die, or remove out of the parish, and the time of holding the leet be at a distance, his place may be filled by the sessions, or if they be not near, by the neighbouring justice of the peace.

It has been adjudged, that a person duly chosen at the leet may be sworn in by the sessions of the peace, though he be rejected by the steward of the leet.

If the constable be present at the time of his election, he ought to be sworn immediately; but if the court be first adjourned, the steward is to issue out a precept commanding him to take the oath before one of his majesty's justices of the peace.

Constables of the city of London, after being chosen by their respective precincts, are confirmed at the court of wardmote, and sworn in at a court of aldermen on the next day after twelfth-day.

There is no particular form of an oath prescribed to be taken by a constable; but that usually administered is to this effect:—

“ You shall well and truly serve our sovereign lord the king,
 “ and the lord of this leet [*if appointed in the court-leet,*] in the
 “ office of a constable, in and for the parish of A, in the county
 “ of B, [*as the case may be*] for the year ensuing, according to the
 “ best of your skill and knowledge.

Petty constables are not obliged, like the high constables, to take the oaths of allegiance and supremacy under 1 Geo. I. st. 2. c. 23.

If the constable be present in court at the time of being elected, and refuse to be sworn, he is liable to be fined: but if he be

absent, he must (as before observed) have a certain time and place appointed him for the purpose of taking the oath before a justice, and have express notice of such appointment; in which case, if he neglect to attend, he may be amerced at the next leet, or be indicted either at the sessions or before the justices of *oyer and terminer*, who will inflict such punishment as they shall deem just.

A constable is not only authorized (like all other persons) to suppress any affray or disturbance which may happen in his presence, but he is bound at his peril, as conservator of the peace, to use his utmost endeavours to that purpose; and that not by himself alone, but he is empowered and bound to demand such assistance from others as he may stand in need of, which they are compellable to afford him, under pain of fine and imprisonment.

If he see persons engaged in an affray, or on the point of entering into one, as where one shall threaten to kill, wound, or beat another, he may either carry the offender before a justice, or may imprison him of his own authority for a reasonable time, till his heat shall be over, and afterwards detain him till he find sureties to keep the peace. But he cannot imprison such offender in any other manner, or for any other purpose; nor ought he to meddle with persons using hot words only to one another, without any bodily hurt, otherwise than by commanding them, under pain of imprisonment, to avoid fighting.

If the affray be in a house, the constable may break open the doors to preserve the peace; as he may also apprehend those who have been guilty of an affray, and fled to a house to shelter themselves from his pursuit. But he cannot apprehend any one for an affray committed out of his own presence, without a warrant from a justice, unless in case of a felony being either actually committed, or likely to be.

If they fly into another county, the constable may in fresh pursuit follow and apprehend him there; but he can interfere no further, otherwise than as any private person, *viz.* take them before a justice of the peace of the county where they are apprehended. If they fly into a franchise, in the same county, he may continue his pursuit of them, and take them out of such franchise, as out of any other place.

By 7 Jac. I. c. 3. in towns not corporate, money given to put out poor children apprentices shall be employed by the parson or vicar, together with the constables, churchwardens, and overseers, who shall have the nomination and placing out such apprentices; and if they refuse or forbear to employ the same, they forfeit 3*l.* 6*s.* 8*d.* each, to be divided between the poor and the prosecutor.

If a person leave an infant in the cold with an intent to destroy it, or with a view of charging the parish with its maintenance, the constable may arrest the offender, and place him in the stocks, or he may otherwise imprison him till he engage to take care of it.

He may likewise apprehend persons riding armed contrary to

the 2.Edw. III. c. 3. which enacts, that no man (save the king's servants, in his presence, and his ministers in the execution of their office, and their assistants) shall go or ride armed in fairs or markets; nor in the presence of the justices, or other ministers; nor elsewhere; upon pain of forfeiting their said arms to the king, and imprisonment during the king's pleasure. On which statute it has been held, that any warden or keeper of the peace may proceed thereon, either *ex officio* or by writ out of Chancery; and if he find any one in arms contrary to the form of the statute, may seize the arms, and commit the offender to prison. If he proceed *ex officio*, he must certify his proceedings into the Court of Exchequer; if by writ out of Chancery, he must certify into that court. He may not only imprison those whom he may find offending, but also those who shall be found, on an inquest taken before him, to have offended in his absence. But it has been adjudged, that no wearing of arms is within the intent of this statute, unless accompanied with such circumstances as are calculated to alarm the people; therefore, persons of quality wearing swords at court, and the like, are not within the statute, as not causing any apprehensions of violence or disturbance of the peace; nor are persons who arm in order to suppress rioters and rebels.

A constable is also authorized to apprehend all suspicious night-walkers; but he must be careful to have reasonable cause of suspicion that they are ill-designing persons, before he molest them.

By 32 Geo. III. c. 53. § 17. any constable or watchman may apprehend any suspected person, or reputed thief, and convey him before a justice; and if it appear on the oath of a credible witness that he is of evil fame, and shall not be able to give a satisfactory account of himself, he shall be deemed a vagabond within the intent of the 17 Geo. II. c. 5. And if any person shall think himself aggrieved, he may appeal to the quarter sessions, on entering into a recognizance, with two sufficient sureties; and if conviction be affirmed, the justices may proceed as they might have done if the party had been committed: but no person convicted under this act shall become liable to any other punishment than imprisonment to hard labour for a term not exceeding six months.

By § 18. it is provided, that nothing herein shall deprive the city of London of any rights or jurisdiction which they had heretofore lawfully exercised within the borough of Southwark.

In cases of felony, a constable may *ex officio* arrest and imprison the offender, until he can conveniently be conveyed to a justice, or the common gaol, and whether the felony be committed in the same or any other village, town, or county, so that the felon be within the precinct over which he is constable. And if the felon resist, and will not be taken, or if, being taken, he is resolute in striving to escape, it is not felony in the constable, but only justifiable homicide, if he shoot or otherwise kill him, in order to prevent his escape. If, in the attempt to make such arrest, the constable or any of his assistants be killed (after notice that they are such), it will be murder.

It is not necessary, in order to apprehend a felon, that he should see the felony committed, it is sufficient if he have information given him of the felon: upon which he is bound to make search for him, and raise hue and cry and pursuit after him, within the limits of his jurisdiction. Also a constable and his assistants are justified in arresting a man upon his being charged of felony, although it turn out that no felony hath been committed; for he that makes the charge is the person who is to be answerable.

If a felon, before he is arrested, fly into another county, he must be taken before a justice of that county, or to the gaol of that county where he is apprehended; but if he be once arrested, and afterwards escape, and fly into another county, and be retaken in immediate pursuit, he may be brought back to the justice or gaol of the county from which he fled.

By 24 Geo. II. c. 55. constables and others, on having a warrant indorsed by a justice in another county, whither an offender shall have escaped, may arrest him in such other county, and take him before the justice who indorsed the warrant, or some other justice of such other county, in order to find bail, if the offence be bailable; but if the offence be not bailable, then he shall carry him back before a justice of the county from whence the warrant first issued.

Formerly, if a warrant were directed generally to all constables, no constable could execute it out of his own district; though if it were directed to a particular constable by name, he might execute it (though not bound to do it) any where within the jurisdiction of the justice by whom it was granted. But now, by the 5 Geo. IV. c. 18. § 5, 6. it is enacted, that it shall be lawful for every constable, headborough, tithingman, borsholder, or other peace officer, for every parish, township, hamlet, or place, to execute any warrant of any justice of the peace, or other magistrate, in any place within that jurisdiction for which such justice or magistrate shall have acted when granting, or backing, or indorsing such warrant, in the same manner as if such warrant had been addressed to such officer specially by his name, and notwithstanding the place in which such warrant shall be executed shall not be the parish, &c. for which he shall be constable, &c.; provided that the same be within the jurisdiction of the justice or magistrate so granting or indorsing such warrant.

The officer to whom a warrant is delivered ought to find out the party, and execute it with all convenient speed. The arrest is to be made by laying hold of, or at least by touching the party; for if the constable or officer merely desires the offender to go with him before a justice, or says that he has a writ for him, or that he arrests him, or the like, without touching him, it is not a legal arrest. It has been held, however, that when a constable found the party in a room, and told him that he arrested him, and locked the door, the arrest was good, for he was then in the custody of the officer.

Though the warrant be directed to two or more constables jointly, any one of them may singly execute it.

An arrest may be made as well in the night as in the day time, whether it be at the suit of the king or of a private person.

A constable, being a sworn and known officer within his own precinct, is not obliged to shew his warrant on its being demanded; but if he be not sworn, or act out of his own precinct, he must produce his warrant, if it be demanded: it is proper, however, in either case, for the officer to acquaint the party with the substance of the warrant, and the cause of the arrest.

By 27 Geo. II. c. 20. it is enacted, that in all cases where a justice of the peace is empowered by statute to issue a warrant of distress for the levying any penalty inflicted, or sum of money thereby directed to be paid, the officer executing such warrant shall, if required, shew the same to the person whose goods and chattels are distrained, and shall also suffer him to take a copy thereof, if he desire it.

In executing a warrant, the officer must be careful to pursue the directions of it, otherwise he will be liable to an action of false imprisonment.

A constable cannot justly arrest another by virtue of a warrant from a justice, which evidently appears upon the face of it to be for an offence over which the justice has no jurisdiction, or to bring the party before him at a place out of the county. Nor where the warrant has been altered, by inserting the name of another officer, or the like. But he is justified in executing a general warrant to bring a person before the justice to answer such matters as may be alleged against him on the part of the king; for he is to presume the justice has cognizance, unless the contrary appear. But it seems that a constable cannot justify in executing a general warrant to search for felons, stolen goods, &c.

In a matter wherein the justice has jurisdiction, although he go beyond his authority, yet the warrant is not disputable by the officer. And so likewise where a warrant is directed from a justice to arrest a particular person for felony, or any other misdemeanor supposed to be committed within his jurisdiction, the officer may lawfully execute it, whether the person mentioned in it be in truth guilty or innocent, or whether any felony has been committed or not.

It has been held that no one, whether constable or other officer can justify the breaking open another's door to make an arrest, without first acquainting him with the cause of his coming, and requesting admittance; and in this case, if the officer have a legal warrant, no particular form of notice is requisite; it is sufficient if the party be made acquainted that the officer comes under a proper authority, and not as a mere trespasser. If he be then denied entrance, he is authorized to break open the doors, and force an entry, in the following cases: Upon a writ of *capias* on an indictment, for whatever crime, or upon a *capias* or warrant of a justice to find sureties for good behaviour; or a *capias utlagatum*, or *capias pro fine* in any action whatsoever. Upon warrant of a

justice in execution of a judgment, or conviction for a forfeiture, grounded on any statute which gives such forfeiture or any part to the king, and authorizes a justice to award the same; but in this case the officer must, in pursuance of 27 Geo. II. c. 20. shew the warrant, if demanded. Where it appears to the satisfaction of a justice (either upon view or inquisition) that the offender forcibly entered the house, or be forcibly detained. When a person having committed a felony, or given another a dangerous wound, be immediately pursued by the officer: but where it is only suspected that a person has committed a felony, &c. and not having been indicted) an officer cannot of his own accord justify breaking open a door to apprehend him. Where a person having been once arrested, afterwards escapes and shelters himself within a house. And the above positions refer as well to the house of another person as that of the offender himself. In cases of affray, if it be made within a house, in the view or hearing of a constable, or where those who have caused an affray in his presence fly to a house, and are immediately pursued by a constable, who is refused entrance, he may justify forcing and entry.

If there be disorderly drinking or noise in a house at an unreasonable time of the night (especially in an inn, tavern, ale, or coffee-house), the constable, or his watch, may, after demanding entrance, and refusal, break open the door in order to see what is doing, and to suppress the disorder.

If an officer enter a house to serve a warrant, and the doors be locked upon him, he may break open the door to regain his liberty; which the law allows of even in civil process, under such circumstances.

But upon a general warrant, expressing neither treason, felony, or surety of the peace, an officer cannot break open any door to execute it.

He cannot lawfully break open the doors of persons named in any warrant made in pursuance of a statute authorizing justices to require persons to come before them for the purpose of taking oaths: such warrant not being grounded on any precedent offence, and it not appearing that the party either is or will be guilty of one.

An officer cannot justify the breaking open an outer door or window, in order to execute any process in a civil suit: but if he find the outer door open, or it be opened to him, he may force any inner door for that purpose. And this privilege is strictly confined to outer doors of a house; so that if an officer gain admittance into the house where any person lodges whom he is in search of, he may justify breaking open the door of any of the apartments to execute his process. But this restriction is confined to arrests in the first instance; for if the person arrested make his escape, the officer may justify the breaking open any house or doors to retake him.

When an offence is committed, for which the constable is authorized to arrest the party, he must carry him to the sheriff of the

county, or his gaoler; or if it be within a franchise, he may convey him to the gaoler of the franchise, who is bound to receive him. But the safest and best way in all cases is to bring the party before a justice of the peace, by whom he may be bailed or committed, as the case may require; for till the offender be bailed or discharged, or the sheriff or bailiff has received him, he remains under the charge of the officer who took him.

If he cannot conveniently convey the offender to a justice of the peace or the common gaol immediately, as if it be in or near night, or there be danger of a rescue, he may place him in the stocks; or if there be no stocks in that village, he may take him to the stocks of the next adjacent village: as also in the case of a sudden affray through passion or excess of drink, the constable or his watch may put the offender in the stocks till the heat of their passion or intemperance be over, or till he can take them before a justice.

If the arrest be made by virtue of a warrant, the prisoner is to be taken before a justice, or otherwise, as the warrant directs; if it direct him to be taken before any justice of the county, it is at the option of the officer to take him before which justice he thinks fit, and not at the election of the prisoner.

After execution of the warrant, the constable is not bound to return the warrant itself to the justice; but may keep it for his justification, in case he should be called in question for what he has done under its authority.

The constable is the proper officer to execute a justice's warrant, to apprehend the reputed father of a bastard child; and if he neglect his duty in this respect, or permit the party to escape after arrest, he will be liable to be indicted and fined.

The constable, on information given him that a man and woman are in adultery or fornication together, or are gone to any house of evil fame in the night time, is to proceed to search the same: and if he find any such persons, he is to carry them before a justice, to find sureties for their good behaviour.

By 22 Hen. VIII. and 1 Ann. c. 18. constables are authorized and enjoined, in case any common bridge be in decay, and it is not known to whom it belongs to repair the same, to summon two of the most able inhabitants of the parish, who are to make an assessment for repairing thereof, which assessment, being allowed by four justices of the division, shall be levied by the said constables on the inhabitants.

By 2 & 3 Ann. c. 6. the constables or other officers taking poor apprentices to any sea-port to be bound to the sea-service, shall witness the counterpart of the indentures, and transmit such counterpart to the churchwardens and overseers.

By 12 Geo. II. c. 29. it is enacted, that in case no rate is levied in any parish, township, or place, for the relief of the poor, the petty constable, or other peace-officer, is to levy the county-rate (as poor's rates are levied), under the direction of the justices at their quarter sessions, and shall, when levied, be paid by such

petty constable to the high constable of the division. And the same shall be paid by or levied upon such petty constable in like manner as rates are levied upon churchwardens and overseers of the poor. It is also by the same act provided, that if any petty constable pay such sum before the same be by him rated and levied, he may afterwards rate and levy the same, or may be allowed the same out of any constable's or other rates made upon such parish or place. And the said act is declared to extend to the counties of York, Derby, Durham, Lancaster, Chester, Westmoreland, Cumberland, and Northumberland, even though poor rates be there levied.

By 11 Geo. II. c. 19. constables are to assist landlords in distraining for rent in arrear, under the authority of a justice's warrant; and, in company with such landlord, may break open and enter into houses, &c. to search for goods suspected to be concealed there for avoiding the distress.

By 2 W. & M. if the party whose goods have been distrained shall replevy the same, the sheriff or constable of the place shall cause the same to be appraised by two sworn appraisers, and shall administer the oath to such appraisers truly to appraise the same, according to the best of their understanding.

The statute of 1 Jac. I. c. 9. § 2. having inflicted certain penalties for drunkenness and tippling at inns, alehouses, &c. to be levied by the constables or churchwardens by distress, it is by the third section of that act provided, that if the constables or churchwardens neglect to levy the said penalties on conviction of the said offence, or, if there be no distress wherewith the same may be levied, do not certify the same for the space of twenty days to the mayor or other head officer within whose jurisdiction the offence is committed, they shall forfeit the sum of 40s. to the poor, to be levied by distress, which shall be detained six days; and if the same be not paid within that time, the goods shall be appraised and sold, and the surplus paid over to the party; and, for want of distress, such constables or churchwardens shall be committed to the common gaol till the penalty be paid.

And further, if the constables or other officers neglect to levy certain other penalties, or to inflict the punishment they are directed to levy and inflict by statute 4. c. 5. of the same king, they shall forfeit the sum of 10s. to be paid to the poor, and levied in the manner aforesaid.

By 11 Geo. I. c. 30. § 30. it is enacted, that if any constable or other ministerial officer of the peace shall, on request made by any officer of excise to go along with him, or to be present at the doing of any thing, for the doing whereof his presence is required by any statute, and such constable or other officer shall neglect or refuse so to do, he shall forfeit the sum of 20*l.* to be levied by distress and sale as in other cases.

By 11 Geo. II. c. 26. § 7. it is provided, that if any constable or other ministerial officer of the peace shall refuse or neglect, on

request, or on their own view of the offence, to assist in the execution of the said act, or of the 9 Geo. II. c. 23. and 10 Geo. II. c. 17. (touching the hawking and selling of spirits without licence) he shall forfeit the sum of 20*l.* one moiety thereof to be paid to the poor of the parish, and the other to the informer.

By 25 Geo. III. c. 49. all constables are to be aiding, and assisting in the execution of that statute, imposing a duty on horses; and they are ordered to obey and execute such precepts as shall be directed to them by the commissioners.

By 8 Geo. II. c. 16. it is enacted, that every constable of any place or district wherein any robbery shall happen, as soon as the same shall come to his knowledge, either by notice from the party robbed, or from any other to whom notice shall be given thereof, pursuant to that or any other statute, shall with the utmost expedition, make fresh suit and hue and cry after the felon; and if he shall offend in the premises, by refusing or neglecting to make fresh suit and hue and cry, he shall forfeit 5*l.* one moiety to the king, and the other moiety to him that will sue for the same. And officers neglecting to levy hue and cry, or to pursue it when levied, are also indictable at common law, and may be fined and imprisoned.

The constable is justified in arresting any one against whom a hue and cry is regularly levied, and may imprison him in the common gaol till he can take him before the justice. And if the person pursued by hue and cry be in a house, and the door be fastened, and is refused to be opened on demand of the constable, he may (after giving notice of the business he comes upon) break open the door, and force admission; and this he may do in all cases where he may arrest the party, though it be only on suspicion of felony. The same law also holds where a hue and cry is levied on a dangerous wound being given.

When hue and cry comes to a constable, he is authorized to search any suspected place within his vill, in order to apprehend the offender; but he cannot justify breaking open doors merely to search, without knowing whether he be there or not; but if he know the offender to be in any particular house, he lawfully may. It must always be remembered, that, in the case of breaking open doors, notice must first be given to those within of his coming, and demand of entrance must also be made, and a refusal given, before the door can be forced.

In common cases, we have seen, that a man cannot be arrested upon any other than express and defined grounds; but in cases of hue and cry, from the nature of the thing, greater latitude is allowed; and therefore, upon a general description of the stature, clothes, horse, &c. of the supposed offender, the officer is justified in apprehending one who answers to the description given, whether guilty or not.

Where the hue and cry is for any species of felony, the constable is bound to pursue the hue and cry which is raised, even though

no description of any kind can be given of the offender. All, therefore, that can be done in such case is to apprehend all such persons whom he may find probable cause to suspect; as, for instance, those who cannot or will not, on demand, give a satisfactory account of themselves.

By 3 Geo. II. c. 25. all petty constables are enjoined to deliver to the high constables on oath, in Michaelmas sessions yearly, correct lists of all persons qualified within their respective parishes to serve on juries, within the ages of twenty-one and seventy years; in which lists they are to insert the christian and surnames, occupations, and places of abode, of the persons whose names they shall so deliver. And every constable who shall neglect or omit to return such lists, shall forfeit the sum of 30s.; and if he wilfully omit the name of any person qualified to serve, or insert wrong names, he shall forfeit the sum of 20s.

If any constable, or any petty constable, shall neglect or refuse to return the lists of persons liable to serve in the militia, as by the deputy lieutenants in the county directed, or shall wilfully make a false return, he may be imprisoned for one month, or (at the discretion of two deputy lieutenants) be fined a sum not exceeding 5*l.* nor less than 40*s.*

By 17 Geo. II. c. 5. all constables receiving any pass or certificate from a justice with any vagrant, &c. shall convey such person according to the direction of the said pass, and the nearest way to the place to which he is ordered, if it be within the same county or division; but if not, the said constable shall deliver such person to the constable of the next county, parish, or division, in the direct way to the place to which such vagrant may be so ordered, together with the pass and duplicate of his examination; and such constable shall, without delay, apply to some justice in the same county or division, who shall make and deliver to him the like pass or certificate for the next constable, and so on, from place to place, till they arrive at the place to which the said vagrant is sent; the constable delivering such pass and certificate is directed to take a receipt for the same from the constable to whom he so delivers them. The like receipt is also to be taken, in this case, of the churchwarden or other person to whom the vagrant is directed.

By the said act, any constable counterfeiting such certificates or receipts, or knowingly permitting any alterations to be made therein, shall forfeit 50*l.*

If any constable shall neglect to convey such vagrant, &c. according to such pass, or if he shall refuse to receive any such person, or to give such receipt as aforesaid, he shall forfeit 20*l.*; the same to be levied by distress and sale of goods. But by 34 Geo. III. c. 101. in case such vagrant, &c. shall be taken sick by the way, so as to be unable to travel without danger, the constable is to take him before a justice, for the purpose of having such pass suspended as long as there may be occasion.

And if he shall neglect his duty in any other respect concerning the matters aforesaid, he shall forfeit a sum not exceeding 4*l.*

nor less than 10s. to be paid to the poor, and levied by distress; and, for want of distress, to be committed to the house of correction, and kept to hard labour, for a space not exceeding two months.

By 13 & 14 Car. II. c. 26. he is required to levy 30s. per firkin upon persons guilty of any fraud in selling butter wholesale; and by 3 Car. I. c. 1. 20s. upon carriers travelling upon a Sunday.

By the common law, constables and other peace officers are bound to do all that in them lies to suppress riots; and they may command all other persons to assist them. And by 1 Geo. I. c. 6. (usually styled the Riot Act), constables and other peace officers are expressly commanded to be assisting the justices in suppressing any riot, and apprehending all offenders in that respect.

Every constable neglecting or refusing to enforce the statute of 13 Geo. III. c. 84. respecting turnpike roads, or to account for any forfeitures as thereby directed, shall, for every such neglect, forfeit the sum of 10*l.*; or if he shall refuse to execute any warrant under the said act, he shall forfeit a sum not exceeding 10*l.* nor less than 40s. at the discretion of the justice of the division; and if such penalties be not forthwith paid, he shall be committed to gaol or the house of correction, for a space not exceeding three months.

By 17 Geo. II. c. 5. it is enacted, that constables shall apprehend all rogues and vagabonds, and convey or cause them to be conveyed to a justice of the peace; and any other person may also apprehend the same, and take them to a justice, or to the constable; and the justice shall reward such person, whether constable or not, by ordering the high constable to pay him the sum of 10s. within a week after the same be demanded; and in towns corporate, and other places where there is no high constable, the petty constable shall himself retain or pay such reward, and be allowed it in his accounts, on producing a receipt thereof; and if such high or petty constable shall not pay such reward within the time aforesaid, he shall forfeit 20s.

If the constable of the parish or district shall not use his best endeavours to apprehend and convey to some justice such offender, he shall, on conviction thereof by the oath of one witness before a justice, forfeit 10s. to the poor, to be levied by distress.

By 22 Geo. III. c. 58. every constable, beadle, and watchman upon duty, shall apprehend any person reasonably suspected of having, between sun-setting and sun rising, any lead, iron, copper, brass, bell-metal, or solder, supposed to be stolen, and carry the offender before a justice.

Constables are directed to be aiding and assisting in the execution of the act of 25 Geo. III. respecting the duty on servants, and to obey and execute the precepts directed to them by any three of the commissioners.

By the annual Mutiny Act, § 24. it is provided, that if any constable presume to quarter or billet any officer or soldier in any

private house, without the consent of the owner, such owner shall have his remedy at law against such officer for the said damage.

If any constable shall quarter any of the wives, children, men or maid servants, of any officer or soldier, in any house, against the consent of the owner, he shall forfeit the sum of 20s. to be levied by distress.

It is also provided, that the constables in Westminster shall, at every quarter sessions for that city, deliver to the justices, upon oath, lists, signed by them, of all houses subject to receive soldiers, together with the number of officers and soldiers quartered in each house; and if any one neglect to deliver up such list, or deliver a false or defective list, he shall forfeit 5*l.* to the use of the poor, to be levied by distress and sale of goods; or, for want of distress, he shall be committed to the common gaol for a time not longer than three months, nor less than one.

If any constable or other officer shall neglect, for the space of two hours, to quarter officers or soldiers when required (provided sufficient notice be given of their arrival), or shall receive, demand, or agree for any money or reward for excusing any person from quartering any such officer or soldier, every such offender shall forfeit a sum not exceeding 5*l.* nor less than 40s. to be levied by distress and sale of goods.

By 18 Geo. III. c. 18. it is provided, that on the 22d day of September in every year the constables of the parish or district, together with the churchwardens, and the householders assessed to parochial or public rates, shall meet at the time and place therein appointed for the purpose of nominating lists of persons out of which surveyors of the highways are to be chosen for the year ensuing.

And, further, the said constables shall, within three days after such meeting, transmit a duplicate or copy of the list there made to one of the justices living near such parish or place, and shall also, within three days after such list is made, give personal notice to, or cause notice in writing to be left at the place of abode of the several persons in the said list contained, informing them thereof, in order that they may severally appear before the justices at their next sessions, to be for that purpose held, and shall return the original list to the justices at their said sessions; and after a person has been chosen surveyor by the said justices, the said constable shall, within three days next after, serve such person with the warrant of appointment, either by leaving the same, or a true copy thereof, at his house or usual place of abode.

It is enacted by 19 Geo. II. c. 21. that in case any person shall profanely swear or curse in the hearing of any constable or other peace officer, such peace officer shall, if the offender be unknown, carry him before the next justice or mayor; and if the said offender be known to such peace officer, he shall give information of the said offence to some justice or mayor, in order that he may be punished as directed by the said act.

And if any constable or peace officer shall wilfully omit the performance of his duty in the execution of the said act, and of such omission be convicted on the oath of one witness, he shall forfeit 40s. to be levied by distress and sale of goods; one moiety to be paid to the informer, and the other to the poor: and if there be no distress, he may be committed to the house of correction, there to be kept to hard labour for the space of one month.

In the city of London, the constables in each ward are to attend the watch by turns, and go their rounds from nine in the evening to seven in the morning, from the 10th of September to the 10th of March; and from ten in the evening till five in the morning, from the 10th of March to the 10th of September: and, with the beadles, they are every night to give notice to such persons as are to serve upon the watch in their respective precincts; and, on their refusing, may hire others in their stead, and pay them according to the custom of the city. They are also to use their best endeavours to prevent fires, robberies, and all kinds of disorders and irregularities, and arrest malefactors; to go twice or oftener about their wards every night, and take charge of, and conduct before a magistrate, all persons delivered to them by the watchmen: and constables misbehaving are to forfeit 20s.

By 7 Jac. I. c. 5. it is enacted, that in any action brought against a constable for any thing done in execution of his office, if he recover against the plaintiff, he shall have double costs.

By 21 of the same king, c. 12. it is declared, that such action shall be tried in the county where the fact charged against him was committed, and not elsewhere.

By 24 Geo. II. c. 44. it is enacted, that no action shall be commenced against any constable, or other person acting by his order or in his aid, for any thing done in obedience to the warrant of the justice, until demand in writing, signed by the party, has first been made, or left at the usual place of his abode, of the perusal and copy of such warrant, and the same has been refused or neglected for six days after such demand; and if, after compliance with such demand, any action be brought, without making the justice who signed such warrant defendant, on producing and proving such warrant at the trial, the jury shall give their verdict for the defendant, notwithstanding any defect of jurisdiction in the said justice. And if such action be brought jointly against the justice and constable, on proof of the said warrant as aforesaid, the jury shall find for the constable, notwithstanding such defect of jurisdiction as aforesaid; and if the verdict be given against the justice, the plaintiff shall recover his costs against him, to be taxed in such manner as to include such costs as the plaintiff is liable to pay to such defendants for whom such verdict shall be so found.

No action shall be brought against any constable after six months from the time of the fact being committed.

But though a constable be acting under the pretended sanction

of his office, yet where the act committed is of such a nature as does not belong to him to do, he will not be protected by the above statute.

It is provided by 18 Geo. III. c. 22. that every constable shall, at the end of every three months of his office, and within fourteen days after he shall quit his said office, deliver to the overseers of the parish or place a just account in writing, fairly entered in a book and signed by him, of all sums expended by him and received on account of the parish, in all cases not provided for by law; and the said overseers shall, within the next fourteen days after such account shall be delivered, lay the same before the inhabitants; and if the same be by them, or a majority, approved of, such overseers shall pay out of the poor's rates the sum that on such accounts shall appear to be due: but if such account, or any part, be disallowed, then the same shall be delivered back to such constable, who may produce the same before a justice (giving a reasonable notice thereof to the overseers), to be examined and settled by him what sum ought to be paid; and the said justice shall enter such sum in the said account, and sign his name thereto; which sum the said overseer shall accordingly pay, with liberty of appealing to the quarter sessions, if they think themselves aggrieved.

By 3 Jac. I. c. 10. it is provided, that every person who shall be committed to gaol by any justice of the peace, and shall not bear the charges of themselves, and such as are appointed to guard them thither, such justice may warrant the constable of the place from whence such persons shall be committed, to sell the goods he shall have within the county or liberty, to satisfy the said charges, delivering the overplus to the party.

By 27 Geo. II. c. 3. if the person so committed to gaol or house of correction have no goods or money within the county where he is taken, sufficient to discharge such expences, then, upon application by the constable to the justice, he shall ascertain the reasonable charges to be allowed, and forthwith order the treasurer of the county to pay the same.

By c. 20. of the last-mentioned act, it is enacted, that any officer making distress under a justice's warrant, shall deduct the reasonable charges of taking, keeping, and selling the same out of the money arising from such sale, and the overplus remaining (after deducting the said charges, and also the penalty, if any inflicted) shall be returned to the owner of the goods; and the officer executing such warrant shall, if required, shew the same to the party, and permit him to take a copy thereof.

By 17 Geo. II. c. 5. § 7. the night constable shall pay to the petty constable all moneys reasonably expended by virtue of that act in passing vagrants, &c. to the respective places to which they may be sent by order of a justice: and in towns and places where there are no night constables, he shall be allowed such expences in his accounts, on his producing proper vouchers for his payments.

By 13 & 14 Car. II. c. 12. if a constable shall continue above a

year in his office, he may be discharged by the sessions, which may substitute another in his room till the next leet; and constables having a right to their discharge may, by application to the Court of King's Bench, obtain a writ of *mandamus* to compel the judge or officer of the inferior court to discharge him.

WATCHMEN.

By the statute of Winchester, 13 Edw. I. st. 2. c. 4. it is provided, that if any stranger (*viz.* any suspicious person) pass by the watch, he shall be arrested till morning, when if no suspicion be found, he shall go quit; but if there be cause of suspicion against him, he shall be delivered to the sheriff (*viz.* to the county or common gaol), who shall keep him till he be acquitted in due manner; and if such person will not submit to the arrest, the watchman shall raise hue and cry upon him, and such as keep the watch shall follow him with the town's people, and so in the next town, and from town to town, till he be taken. Or he may force such person to submit to his authority by beating him, or may set him in the stocks until the morning, and he shall not be punished for the assault.

The watchmen may also deliver suspicious persons, and all night-walkers and vagabonds, to the constable of the district, or, after retaining them till morning, may convey them before a justice of the peace to be examined.

If a watchman take any one for suspicion of felony, he may inquire of his good name and fame; and if he find him of good name and fame, he may let him go, without being guilty of an escape.

If a watchman is killed in the execution of his duty, it is murder. And should he lose his life in endeavouring to apprehend a burglar or housebreaker, his representatives will be entitled to receive the sum of 40*l.* from the sheriff. 5 Ann. c. 31, § 2.

PARISH CLERKS.

Parish clerks were formerly very frequently in holy orders, and some are to this day. They are generally appointed by the incumbent, who, by the 91st canon of the church, is to signify such nomination to the parishioners on the next Sunday following, either before or after the conclusion of divine service. But, by custom, they may be chosen by the parishioners at a vestry held for that purpose; and if such custom appears, the Court of King's Bench will grant a *mandamus* to the archdeacon to swear him in, for the establishment of the custom turns it into a temporal or civil right.

As parish clerks are regarded by the common law to have freeholds in their offices, they cannot be deprived of them by ecclesiastical censures; but they are liable to be punished by the ordinary.

A person chosen to be parish clerk must be at least twenty years of age, be able to read and write, and should have a competent knowledge of psalmody.

SEXTONS.

Sextons, like parish clerks, cannot be removed from their offices by the ordinary, though they may be censured or punished by him. He is chosen by the parish: and his business is to keep the church and pews cleanly swept and sufficiently aired; to make graves, and open vaults, for the burial of the dead; to provide (under the churchwardens' directions) candles, &c. for lighting the church, bread and wine and other necessities for the communion, also water for baptisms; to attend the church during divine service, in order to open the pew-doors for the parishioners, keep out dogs, and prevent disturbances, &c.

VESTRY CLERKS.

Vestry clerks are chosen by the vestry, during pleasure. Their business is to attend all parish meetings; to draw up and copy all orders and other acts of the vestry, and to give copies thereof to the parishioners when required. They are also to have the charge and custody of all books and papers belonging or relating to the business of the vestry.

BEADLES.

This is an officer appointed by the vestry. His business is to give notice to the parishioners when and where a vestry is appointed by the churchwardens; to attend upon it when met, and to execute its orders. He is also to assist the churchwardens, overseers, and constables in their respective duties, when commanded, and generally to do and execute all the orders and business of the vestry and of the parish.

SURVEYORS OF THE HIGHWAYS.

We are next to consider the surveyors of the highways. Every parish is bound of common right to keep the high roads that go through it in good and sufficient repair; unless by reason of the tenure of lands, or otherwise, this care is consigned to some particular private person. From this burden no man was exempt by our ancient laws, whatever other immunities he might enjoy. And indeed now, for the most part, the care of roads only seems to be left to parishes; that of bridges being in a great measure devolved upon the county at large, by the 22 Hen. VIII. c. 5. If the parish neglected these repairs, they might formerly, as they may still, be indicted for such their neglect; but it was not then incumbent upon any particular officer to call the parish together and set them upon this work; for which reason, by the 2 & 3 Ph. & Mar. c. 3. surveyors of the highways were ordered to be chosen in every parish.

These surveyors were originally, according to the statute of Philip and Mary, to be appointed by the constable and church-wardens of the parish; but now they are constituted by two neighbouring justices, out of such inhabitants or others as are described by the 13 Geo. III. c. 78. and may have salaries allotted to them for their trouble.

Their office and duty consists in putting in execution a variety of laws for the repair of the public highways, that is, of ways leading from one town to another; all which are now reduced into one act by 13 Geo. III. c. 78. which enacts, 1. That they may remove all annoyances in the highways, or give notice to the owner to remove them; who is liable to penalties on non-compliance. 2. They are to call together all the inhabitants and occupiers of lands, tenements, and hereditaments within the parish, six days in every year, to labour in fetching materials or repairing the highways: all persons keeping draughts (of three horses, &c.), or occupying lands, being obliged to send a team for every draught, and for every 40*l.* a year which they keep or occupy; persons keeping less than a draught, or occupying less than 50*l.* a year to contribute in a less proportion; and all other persons chargeable, between the ages of sixteen and sixty-five, to work or find a labourer. But they may compound with the surveyors, at certain easy rates established by this act, as also by 34 Geo. III. c. 74. § 3; 44 Geo. III. c. 52. § 2. By the former of which acts (*viz.* 34 Geo. III.) justices are empowered to exempt the poor occupiers of tenements from the payment of assessments towards the highways, and the whole burden of the repairs of such highways is thrown upon the occupiers of tenements. And every cart-way leading to any market town must be made twenty feet wide at the least, if the fences will permit; and may be increased by two justices, at the expence of the parish, to the breadth of thirty feet. Also two justices, where they think it will render the road more commodious, may order it to be diverted; but this power to enlarge does not extend to pull down any building, or to take in the ground of any garden, paddock, court, or yard. And no tree or bush shall be permitted to grow in any highway within fifteen feet from the centre of it, except for ornament or shelter to a house; and the owners of the adjoining lands may be compelled to cut their hedges, so as not to exclude the sun and wind from the highway. 3. The surveyors may lay out their own money in purchasing materials for repairs, in erecting guide-posts, and making drains, and shall be reimbursed by a rate to be allowed at a special sessions.

CHAPTER VII.

Of Corporations.

BY the term *corporation* is meant an investry of the people of a particular place with the local government thereof.

Of corporations some are sole, some aggregate; *sole*, when in one single person, as the king, bishop, dean, &c.; *aggregate*, consisting of many persons, as mayor and commonalty, dean and chapter, &c.

Corporations are likewise spiritual or temporal. Some are of a mixed nature, composed of spiritual and temporal, such as heads of colleges and hospitals, &c.

Lay corporations are of two sorts, civil and eleemosynary. The *civil* are erected for a variety of purposes; as the king, to prevent an interregnum or vacancy of the throne; a mayor and commonalty, bailiff and burgesses, and the like, for the advancement and regulation of manufactures and commerce. The *eleemosynary* sort are such as are constituted for the perpetual distribution of free alms; as all hospitals, colleges, &c.

A corporation may be created by the common law, by charter, by act of parliament, or by prescription. When a corporation is created, a name must be given to it; and by that name alone it must sue and be sued, and do all legal acts.

When a corporation is duly created, all other incidents are tacitly annexed to it; as, 1. To have perpetual succession. 2. To sue and be sued, implead or be impleaded, grant or receive, by its corporate name; and do all other acts as natural persons may. 3. To purchase lands, and hold them for the benefit of themselves and their successors; and to have a common seal. But to enable corporations to purchase and hold lands in mortmain, they must have a licence from the king. 4. To make bye-laws or private statutes for the better government of the corporation. And where the power of making bye-laws is in the body at large, they may delegate their right to a select body, who thus become the representative of the whole community.

An aggregate corporation must always appear by attorney; it cannot be made plaintiff or defendant in an action of battery, or for the like personal injuries; it cannot commit treason or felony, or other crime, in its corporate capacity, though its members may in their individual capacities; it is not capable of suffering a traitor's or a felon's punishment, for it is not liable to corporeal penalties, nor to attainder, forfeiture, or corruption of blood. It cannot be executor or administrator, or perform any personal duties. It cannot be seised of lands to the use of another; neither

can it be committed to prison, and therefore cannot be outlawed. It cannot be excommunicated, or summoned into the ecclesiastical courts on any account. But an aggregate corporation may take goods and chattels for the benefit of themselves and successors, which a sole corporation cannot do. In ecclesiastical or eleemosynary corporations, the king or founder may mark out the rules and ordinances they shall observe; but corporations instituted for civil purposes are only subject to the common law, and their own bye-laws not repugnant to the laws of the realm. Aggregate corporations also, that have by their constitution a head, as a dean, warden, or master, cannot do any acts during the vacancy of the headship, except only appointing another; but there may be a corporation aggregate without a head, as the governors of the Charter-house. In aggregate corporations, also, the act of the major part is esteemed the act of the whole. No corporation of any description can take a devise of lands, except by 43 Eliz. c. 4. for charitable uses: which exception is narrowed by 9 Geo. II. c. 36. by an abridgment of their privilege of purchasing from any living grantor, without the king's licence; which purchases made by corporate bodies are considered to be purchases in mortmain, of which we shall treat hereafter.

The ordinary is the visitor of all ecclesiastical corporations; and the founder, his heirs and assigns, of all lay corporations, whether civil or eleemosynary.

A corporation may be dissolved—1. By act of parliament. 2. By the natural death of all its members, in case of an aggregate corporation. 3. By surrender of its franchises into the hands of the king. 4. By forfeiture of its charter, through negligence, or abuse of its franchises; in which case the law judges that the body politic has broken the condition upon which it was incorporated, and thereupon the incorporation is void. And the regular course is, to bring an information in nature of a writ of *quo warranto*, to inquire by what warrant the members now exercise their corporate power, having forfeited it by such and such proceedings.

To facilitate the proceedings in cases of *mandamus* and *quo warranto*, the 12 Geo. III. c. 21. provides, that where any person shall be entitled to be admitted a freeman, &c. of any corporation, &c. and shall apply to the proper officer to be admitted, and shall give notice of his intention to move the Court of King's Bench for a *mandamus* in case of refusal, the officer shall pay all the costs of the application. And the proper officer shall, on the demand of two freemen, permit them and their agents to inspect the entries of admission of freemen, and to take copies and extracts, under penalty of 100*l*.

And, to prevent improper conduct in trading corporations in elections, and in disposing of the joint stock, it is, by 7 Geo. III. c. 48. enacted, that no member of such corporation shall be admitted to vote in the general courts, unless he shall have been six

months in possession of the stock necessary to qualify him; unless it came to him by bequest, marriage, succession, or settlement.

CHAPTER VIII.

Of Master and Servant.

SERVANTS are of several kinds. The first sort acknowledged by the laws of England are *menial servants*. The contract of relation between master and servant arises from the hiring. If the hiring be general, without any particular time mentioned, the law construes it to be a hiring for the year; but the contract may be made for any longer or shorter time. And on every general hiring for a year, a quarter's warning must be given before the contract can be dissolved; unless for some reasonable cause, to be allowed by a justice of the peace. But it has been held, that a master may turn a servant away for incontinence, or moral turpitude, without any notice. But a servant cannot be discharged for being the father of a bastard child, if the crime was committed prior to the master's hiring of him.

The 20 Geo. II. c. 19. gives the magistrates jurisdiction to determine differences between masters and servants hired in husbandry, where the sum does not exceed 10*l.*; and with respect to artificers, handicraftsmen, miners, &c. or other labourers hired for any certain time, where the sum does not exceed 5*l.*

By 4 Geo. IV. c. 34. § 3. if any servant in husbandry, or any artificer, calico printer, handicraftsman, miner, collier, keelman, pitman, glaser, potter, labourer, or other person, shall contract to serve any person, and shall not enter into such service, or shall absent himself before the term of contract shall be completed, or neglect to fulfil the same, or shall be guilty of any other misconduct or misdemeanor, any justice of the peace of the county or place may issue his warrant for the apprehending every such servant; and if it shall appear that he or she shall not have fulfilled such contract, he may commit such person to the house of correction, there to be held to hard labour for a time not exceeding three months, and may abate a proportionable part of his or her wages, or in lieu thereof, may punish the offender by abating the whole or any part of his or her wages, or may discharge such servant.

And justices upon complaint concerning the non-payment of wages, may summon the steward, agent, bailiff, foreman, or manager, in the absence of the master, mistress, or employer, and may hear and determine the matter of complaint; and may also make an order for the payment of so much wages as shall appear to be justly due, provided that the sum do not exceed 10*l.* § 4.

Justices before whom complaint is made in pursuance of the

20 Geo. II. c. 19. and 31 Geo. II. c. 11. may order wages to be paid to persons entitled thereto within such period as they shall think proper. § 5.

By the 59 Geo. III. c. 58. justices are empowered, on complaint of seamen in the merchant service, to hear and settle disputes about wages not exceeding 20*l.*; and they are authorized to levy the same by distress on the goods and chattels of the master, or commander, or owner, in case of a refusal to comply with their decision; and provided the distress should not be sufficient, they are then authorized to distrain on the ship or vessel, or any of the tackle, furniture, or apparel thereof. And such justices' determination is to be final, unless appealed against to the Admiralty Court, § 1.

In case the seaman or mariner, or other person claiming such wages, or the parties who are ordered to pay the same, or their agents, shall be dissatisfied with the decision of the justice or justices touching such wages, it shall be lawful for either of them, within forty-eight hours after the making such order, but not afterwards, to give notice in writing to the justice making such order, of his or their desire of obtaining the judgment of the High Court of Admiralty respecting the same; and thereupon the party so resisting shall be compelled to proceed within thirty days from the date of such order, by taking out a monition against the adverse party, and shall (on the service of such notice) give good and sufficient bail in double the amount of the wages so ordered to be paid (which bail shall be taken by a commissioner for taking examinations in prize causes, if there shall be one in the place where such difference shall arise, or order be made; but if there shall be no such commissioner there, then the justice pronouncing such order, or any other justice of the peace, is authorized to take the same); and the commissioner or justice taking such bail shall certify and transmit the same without delay to the High Court of Admiralty, with a copy of the order made by such justice, on unstamped paper, certified under his hand; and the same shall be admitted by such Court of Admiralty as evidence in the cause. § 2.

Seamen are not to be deprived of the benefit of any agreements entered into before the passing of this act; nor shall any thing in this act contained extend to deprive any seaman, mariner, or other person, of any remedy, or process, which may now be resorted to against any ship or vessel, or the master or commander or owners thereof, for the recovery of wages due for serving on board of such ship or vessel. § 3, 4.

This act is not to extend to Scotland, and shall continue in force for seven years from the passing thereof. § 6, 7.

The second kind of servants are *apprentices*. By the common law, infants, or persons under age, cannot bind themselves apprentices in such a manner as to entitle their master to an action of covenant, or other action against them, for departing from their service, or other breach of the indentures; which makes it necessary to get some of their friends to be bound for them.

And, notwithstanding the 5 Eliz. c. 4. enacts, that although persons bound apprentices shall be within age at the time of making their indentures, they shall be bound to serve for the years in their indenture contained, as if they were of full age at the time of making them; it has been held, that although an infant may voluntarily bind himself apprentice, and if he continue an apprentice for seven years, he may have the benefit to use his trade, yet, neither at the common law, nor by the words of the above-mentioned statute, can a covenant or obligation of an infant for his apprenticeship bind him; but if he misbehave himself, the master may correct him while in his service, or complain to a justice of the peace to have him punished according to the statute; but no remedy lies against an infant upon such covenant.

But, by the custom of London, an infant unmarried, and above the age of fourteen, may bind himself apprentice to a freeman of London, by indenture with proper covenants; which covenants shall be as binding as if they were of full age.

By 6 Eliz. c. 4. § 35. the justices may compel certain persons under age to be bound as apprentices, and on refusal may commit them, &c. And by 43 Eliz. c. 2. and 18 Geo. III. c. 47. churchwardens and overseers of the poor may bind out the children of the poor to be apprentices, with the consent of two justices; if boys, till twenty-one; if girls, till that age or marriage. And by 8 & 9 W. III. c. 30. § 5. if any person refuse to accept a poor apprentice, he shall forfeit 10*l*. Also by 2 & 3 Ann. c. 6. and 4 Ann. c. 10. justices of the peace, and churchwardens, &c. may put out poor boys apprentices to the sea service.

By 5 Eliz. c. 5. and 5 Geo. II. c. 46. indentures must be enrolled in all towns corporate, and in London, by custom, in the chamberlain's office.

In London, if the indentures are not enrolled before the chamberlain within a year, upon a petition to the mayor and aldermen, &c. a *scire facias* shall issue to the master, to shew cause why not enrolled; and if it was through the master's default, the apprentice may sue out his indentures, and be discharged.

Indentures are to be stamped, and are chargeable with stamp duties; for the amount of which, the reader is referred to the Supplement, under the article "Stamp Duties."

The justices of the peace may discharge an apprentice, not only on the default of the master, but also on his own default; for in such case it is but reasonable that the contracts which were made by their authority, should be dissolved by the same power. And under the above mentioned statute, 5 Eliz. c. 4. justices, or the sessions, may hear and determine disputes between masters and apprentices; and the sessions may discharge the apprentice, and vacate the indentures, or correct the apprentice. By 20 Geo. II. c. 19. parish apprentices may be discharged in the same manner by two justices. And by 32 Geo. III. c. 57. where a parish apprentice is discharged from a master on account of the misconduct of the master, the justices may order the master to deliver up the

clothes, and to pay a sum not exceeding 10*l.* to place him with another master.

By the 33 Geo. III. c. 55. wherever a master or mistress has not received more than 10*l.* with an apprentice, two or more justices at a special or petty sessions may, upon complaint or ill-use of the apprentice, fine the master or mistress any sum not exceeding forty shillings; and the fine may, at the discretion of the justices, be applied to the use of the apprentice, as a compensation for the injury which he may have sustained.

By 4 Geo. IV. c. 29. the 20 Geo. II. c. 19. and the 33 Geo. III. c. 55. so far as the same relate to apprentices, shall be construed to extend to all apprentices, upon whose binding out no larger sum than 25*l.* was or shall be paid. § 1.

And any two or more justices of the peace, in any case where they shall direct any apprentice to be discharged under the said recited acts or this act, may take into consideration the circumstances under which such apprentice shall be so discharged, and may make an order upon the master or mistress of such apprentice to refund all or any part of the premium paid upon the binding or placing out of such apprentice; and in default of payment may levy the same by distress, and in case there shall not be goods sufficient, may order imprisonment for any time not exceeding two months. § 2.

Whatever an apprentice gains is for the use of his master; and whether he was legally bound or no, is not material, if he was an apprentice *de facto*. And an apprentice leaving his master's service, must serve beyond the term for the time he was absent, if it be within seven years after the expiration of his term.

If a master give an apprentice licence to leave him, he cannot afterwards recall it. And if a master discharge his apprentice on account of negligence, equity will decree him to refund a rateable part of the money given with him, according to the length of time he has been in his service. So, if an apprentice marry without his master's privity, that will not justify his turning him away, but he must sue his covenant. But, by the custom of the city of London, a freeman may turn away his apprentice for gaming.

A master may correct and chastise his apprentice for neglect or misbehaviour, provided it is done with moderation; but his mistress is not entitled to the same power.

By the 4 Geo. IV. c. 34. § 1. (the powers of the 20 Geo. II. c. 19. and the 4 Geo. IV. c. 29. are extended by this act), it shall be lawful, not only for any master or mistress, but also for his or her steward, manager, or agent, to make complaint upon oath against any apprentice, within the meaning of the said acts, to any justice of the peace, for any misdemeanor, misconduct, or ill behaviour; or if such apprentice shall have absconded, any justice of the peace of the county or place where such apprentice shall be found, or where he or she shall have been employed, may issue his warrant for his or her apprehension; and may hear and determine the complaint, and punish the offender, by abating the whole or

any part of his or her wages, or otherwise by commitment to the house of correction, there to remain and be held to hard labour, for a time not exceeding three months.

And all complaints, differences, and disputes which shall arise between masters or mistresses and their apprentices, within the meaning of the said recited acts, or any of them, touching or concerning any wages, provided the sum do not exceed 10*l.* shall and may be heard and determined by one or more justices of the peace of the county or place where such apprentice shall be employed.

The enticing an apprentice to depart from his master, subjects the offending party to an action on the case.

An apprentice is protected also from being impressed.

With regard to the assigning of apprentices, it has been held that they are not assignable. But, by the custom of London, he may be turned over to another. And if the assignee do not provide for him, the first master may be compelled to do it.

And this inability of assigning apprentices extends to justices of the peace, who, though they have the power of discharging apprentices, and of binding them to other masters, yet they cannot turn them over.

By the death of either the master or apprentice, the interest, being a mere personal trust, is determined. But if the master covenant to find the apprentice during the term in necessaries and clothing, the death of the master will not determine the condition, but his executors will be bound to perform it as far as they have assets.

In the case of *Coam v. Bowden and Eyles*, the master having received 250*l.* with his apprentice, it was determined, that, after specialty debts were paid, the executors should repay the 250*l.* first deducting for his maintenance 20*l.* a year, for the two years the apprentice had served.* The same practice takes place when the master becomes a bankrupt.

We now come to treat of the manner in which the relation of service affects either the master or servant. Servants, by a hiring for a year, and apprentices by their binding, gain a settlement in the parish where they serve the last forty days. Apprentices serving seven years as apprentices to any trade, have an exclusive right to exercise that trade in any part of England, by the 5 Eliz. c. 4. But no trades are held to be within the statute, but such as were in being at the making of it. For trading in a country village, apprenticeships are not requisite. And following the trade seven years, either as a master or a servant, or as the master's wife, without any effectual prosecution, is sufficient without an actual apprenticeship.

Though a master may by law correct his apprentice for negligence or other misbehaviour, yet he is not allowed to beat any other servant; for if he do, it is a good cause of departure, or at least of complaint to a magistrate, in order to be discharged.

If a servant retained for a year happen within the time of his

service to fall sick, or be otherwise hurt or disabled in the service of his master; the master cannot put him away, nor abate any part of his wages for that time.

A master is not bound to give a servant a character, there being no legal obligation to that effect. But if he do give a character, he must take care to give a true one; though, if the words be spoken in confidence and without malice, no action lies; as, where a mistress told a lady, inquiring after the character of a servant, that she was saucy and impertinent, and often lay out of her own bed, but was a clean girl, and could do her work well; notwithstanding the plaintiff proved that she was by this means prevented from getting a place.

Let us next see how strangers may be affected by the relation of a master and servant.

And first, then, a master may support or maintain his servant in an action at law against a stranger; or may bring an action against another for beating or maiming him, assigning as a ground for the action a loss of service; or he may even justify an assault in his defence; as may a servant in defence of his master. And if any person knowingly hire the servant of another, while in service, the first master may have an action to recover damages against the servant and the person hiring him, or either of them; but if the new master did not know that the servant was already hired, no action lies, unless he afterwards refuse to restore him.

As for those things which a servant may do on behalf of his master, they seem all to proceed upon this principle, that the master is answerable for the act of his servant, if done by his command, either expressed or implied. And, therefore, if a servant commit a trespass by the command of his master, the master is guilty of it, though the servant is not excused, for he is only to obey his master in matters that are honest and lawful. If an innkeeper's servants rob his guests, the master is bound to restitution. So likewise, if the waiter at a tavern sell a man bad wine, whereby his health is injured, he may bring an action against the master.

In the same manner, whatever a servant is permitted to do in the course of his business, is equivalent to a general command. If I pay money to a banker's servant, the banker is answerable for it; if I pay money to a clergyman's or physician's servant, whose usual business it is not to receive money for his master, and he embezzle it, I must pay it over again. If a steward let a lease of a farm without the owner's knowledge, the owner must stand to the bargain; for this is the steward's business. A wife, a friend, a relation that used to transact business for a man, are *quoad hoc* his servants; and the principal must answer for their conduct. If I deal usually with a tradesman by myself, or constantly pay him ready money, I am not answerable for what my servant takes up upon trust; for here is no implied order for the tradesman to trust my servant: but if I usually send him upon trust, or sometimes upon trust, and sometimes with ready money, I am answerable for all he takes up; for the tradesman cannot possibly dis-

tinguished when he comes by my order, and when he comes upon his own authority. And if I once pay what my servant has bought upon trust, without expressing any disapprobation of it, it is equivalent to a direction to trust him in future.

Lastly, if a servant, by his negligence, do any damage to a stranger, the master shall answer for his neglect. If a smith's servant lame a horse while he is shoeing him, an action lies against the master, and not against the servant. But in these cases the damage must be done while he is actually employed in the master's service; otherwise the servant shall answer for his own misbehaviour. Upon this principle, by the common law, if a servant kept his master's fire negligently, so that his neighbour's house was burnt down thereby, an action would lie against the master, because his negligence happened in his master's service: otherwise, if the servant, going along the street with a torch, by negligence sets fire to a house; for there he is not in his master's immediate service, and must himself answer the damage personally. But now the common law is, in the former case, altered by 6 Ann. c. 3. which ordains that no action shall be maintained against any in whose house or chamber any fire shall accidentally begin. But if such fire happen through negligence of any servant, such servant shall forfeit 100*l.* to be distributed among the sufferers; and, in default of payment, shall be committed to some workhouse, and there be kept to hard labour for eighteen months. A master is, lastly, chargeable if any of his family lay or cast any thing out of his house into the street or common highway, to the damage of any individual, or the common nuisance of any of his majesty's liege people; for the master has the superintendence and charge of all his household.

But where the act of the servant is wilful, the master is not responsible, unless the act is done by his command or assent.

But where the mischief ensues from the negligence and unskilfulness of the servant, so that an action upon the case must be brought, and not an action of trespass, then the master will be answerable for the consequences, if it be shewn that the servant is acting in the execution of his master's business and authority.

To prevent masters from being imposed upon in the characters of their servants, it is enacted by the 32 Geo. III. c. 58. that if any person shall give a false character of a servant, or a false account of his former service; or if any servant shall give such false account, or shall bring a false character, or shall alter a certificate of a character; he shall, upon conviction before a justice of the peace, forfeit 20*l.* with 10*s.* costs. And if any servant will inform against an accomplice, he shall be acquitted.

An action was tried at the sittings after Trinity Term, 1792, at Guildhall, against a person who had knowingly given a false character of a man to the plaintiff, who was thereby induced to take him into his service. But this servant soon afterwards robbed his master of property to a great amount, for which he was

executed; and the plaintiff recovered damages against the defendant to the extent of his loss.

By 14 Geo. III. if a servant by carelessness or through negligence set fire to any dwelling-house, he or she is subject to a fine of 100*l.* or in default of payment thereof, is to be committed to the house of correction for eighteen months, and to be kept to hard labour.

CHAPTER IX.

Of Husband and Wife.

THE law considers marriage in no other light than a civil contract; and therefore, like all other contracts, it is good when the parties at the time of making it were willing to contract, able to contract, and actually did contract, in proper form of law.

As to the first, the maxim is, that *consensus, non concubitus, facit nuptias*. As to the second, all persons are able to contract themselves in marriage, unless they labour under the canonical disabilities of precontract, consanguinity or relation of blood, and affinity or relation by marriage, and some particular corporeal infirmities, (but these disabilities only render the marriage voidable, and not *ipso facto* void); or under the civil disability of a prior marriage, as having another husband or wife living; of, being under age; of wanting the consent of parents or guardians; or, of being insane. As to the third, no marriage actually performed is, by the temporal law, *ipso facto* void; that is, which is celebrated by a person in orders, in a parish church or public chapel (or elsewhere by special dispensation), in pursuance of banns or a licence, between single persons consenting, of sound mind and of the age of twenty-one years (or of the age of fourteen in males, and twelve in females, with consent of parents or guardians, or without in case of widowhood). And no marriage is voidable, by the ecclesiastical law, after the death of either of the parties; or during their lives, unless for the canonical impediments of precontract, of consanguinity, of affinity, or of corporeal imbecility, subsisting previous to the marriage.

Marriages may be dissolved either by death or by divorce.—Divorce is either a *vinculo matrimonii*, for some of the canonical causes before mentioned, and those existing before the marriage, as is always the case in consanguinity; not supervenient and arising afterwards, as may be the case in affinity or corporeal imbecility: or merely a *mensâ et thoro*, for some supervenient cause, which makes it improper or impossible for the parties to live together; as in the case of intolerable ill-temper, or adultery in either of the parties.

In case the divorce is a *vinculo matrimonii*, the marriage is declared null, as having been absolutely unlawful *ab initio*: and the parties are therefore separated, *pro salute animarum*; but in divorce *a mensu et thoro*, the marriage is suspended, but not destroyed.

In case of divorce *a mensu et thoro*, the law allows alimony to the wife, which is that allowance which is made to a woman for her support out of her husband's estate; being settled at the discretion of the ecclesiastical judge, on consideration of all the circumstances of the case. It is generally proportioned to the rank and quality of the parties. But in case of elopement, and living with an adulterer, the law allows no alimony.

The law considers husband and wife as one person; for the very being or legal existence of the woman is suspended during marriage, or at least is incorporated and consolidated into that of the husband, under whose wing, protection, and cover, she performs every thing, and therefore is called a *feme covert*. A man, therefore, cannot grant any thing to his wife, but by the intervention of trustees, or enter into covenant with her: for the grant would be to suppose her separate existence; and to covenant with her would only be to covenant with himself. But a woman may be attorney for her husband, for that implies rather a representation of, than a separation from him. And, by the assent of her husband, she may contract as his substitute, as in case either of sale or loan. This assent may be either expressed or implied; it may be prior or subsequent to the contract. If prior, and communicated to the defendant, the contract made is an actual contract, and not merely virtual with the husband; if subsequent, then the wife's contract is inchoate and imperfect, until affirmed by her husband; and such affirmation, if given, transfers the contract to him. If the wife be indebted before marriage, the husband is liable to such debts, and the husband and wife may be sued for them during the coverture. But if these debts are not recovered against the husband and wife in the life-time of the wife, the husband cannot be charged for them, either in law or equity, after the death of the wife; unless there be some part of her personal property which he did not reduce into his possession before her death; to the extent of which he will be liable to pay his wife's debts *dum sola*, which remained undischarged during the coverture. But if the wife survive the husband, an action may be maintained against her for these debts. If the wife be injured in her person or property, she can bring no action for redress without her husband's concurrence, and in his name as well as her own; neither can she be sued, without making her husband a defendant. There is indeed one case where the wife shall sue and be sued as a *feme sole*, viz. where the husband has abjured the realm, or is banished; for then he is dead in law. But this principle will not extend to an agreement of separation, with a separate maintenance by deed: for a man and his wife cannot, by their own act, change their legal capacities and characters. In criminal prosecutions, it is true, the wife may

be indicted and punished separately. But in trials of any sort they are not allowed to be evidence for or against each other. Yet in all cases, where the crime is a violence done to the person of the other, the husband may be evidence against the wife, and the wife against the husband. And where the offence is directly against the person of the wife, this rule has been dispensed with: and therefore, by the 3 Hen. VII. c. 2. in case a woman be forcibly taken away, and married, she may be a witness against such her husband, in order to convict him of felony.

In the civil law, the husband and wife are considered as two distinct persons, and may have separate estates, contract debts, and injuries; and therefore, in our ecclesiastical courts, a woman may sue and be sued without her husband. So in a court of equity, a *feme covert* having a separate estate, may be sued as a *feme sole*, and may be proceeded against without her husband. And as baron and feme in such cases are looked upon as distinct persons, a wife may, by her *prochein amy*, sue her own husband.

But though our law in general considers man and wife as one person, yet there are some instances in which she is separately considered as inferior to him, and acting by his compulsion. And therefore all deeds executed, and acts done by her, during her coverture, are void; except it be a fine, or the like matter of record, in which case she must be solely and secretly examined, to learn if her act be voluntary. She cannot by will devise her lands to her husband, unless under special circumstances; for at the time of making it she is supposed to be under his coercion. — And in some felonies, and other inferior crimes, committed by her through constraint of her husband, the law excuses her: but this extends not to treason or murder.

A wife may have security of the peace against her husband; or, in return, a husband against his wife: and the courts of common law will still permit a husband to restrain his wife of her liberty, in case of any gross misbehaviour.

With respect to the husband's liability for his wife's contracts, it may be observed in general, that a husband being bound to provide his wife with necessaries, if she contract debts for them, he is answerable, unless he give express notice to the tradesmen not to trust her. For during cohabitation the law will presume the assent of the husband to all contracts made by the wife for necessaries suitable to his degree and estate; and the misconduct, or even the adultery of the wife, during that period, will not destroy the presumption. The same law is, when the husband deserts his wife, or turns her away, without any reasonable ground, or compels her by ill-treatment or severity, to leave him; although he advertises her, and cautions all persons not to trust her, or gives particular notice to individuals not to give her credit, still he will be liable for necessaries furnished to her.

But if a wife elope from her husband, and live in adultery, the husband cannot be charged by her contracts. And although the

husband was the aggressor, by living in adultery with another woman, and although he turned his wife out of doors at a time when there was not any imputation upon her conduct; yet if she afterwards commit adultery, he is not bound to receive or support her after that time, nor is he liable for necessities which may have been provided for her after that time. Neither when the husband turns his wife out of doors, on account of her having committed adultery under his roof, is he liable for necessities furnished to her after the expulsion. Yet if he receive her again, the assumption of his assent revives, and attaches upon the contracts made by her after the reconciliation.

So if a woman elope from her husband, though she do not go away with an adulterer, or in an adulterous manner, the tradesman trusts her at his peril, and the husband is not bound.

If the wife, with the consent of her husband, live apart from him, and have a separate maintenance, and contract debts for necessities during the separation, the law will presume that she is trusted on her own account, although the tradesman had not any notice of the separation at the time of the contract, if it was the general reputation of the place where the husband lived, that he and his wife were living apart. But if the demand be for necessities, it is then incumbent on the husband to shew that the tradesman had notice of the separate maintenance.

If a man cohabit with a woman to whom he is not married, and permit her to assume his name, and appear to the world as his wife, and in that character to contract debts for necessities, he will become liable, although the creditor be acquainted with her real situation.

If a man marry a woman having children by a former husband, he is not bound by the act of marriage to maintain such children; but if he hold them out to the world as part of his family, he will be considered as standing *in loco parentis*, and liable even to a contract made by his wife during his residence abroad for their maintenance and education.

A husband cannot be charged at law for money lent to his wife even for the purpose of buying necessities, because it may be misapplied. But if the money be laid out in necessities, equity will consider the lender as standing in the place of the person providing the necessities, and decree relief.

CHAPTER X.

Of Parent and Child.

CHILDREN are of two sorts, legitimate and spurious. A *legitimate* child is he that is born in lawful wedlock, or within a competent time afterwards. *Pater est quem nuptiæ demonstrant*; but the nuptials must be precedent to the birth.

Parents are, by a principle of natural law, obliged to maintain their legitimate children; and it is provided by the 43 Eliz. c. 2. that the father and mother, grandfather and grandmother of poor impotent persons, shall, by order of two justices, allow them twenty shillings a month, or thirteen pounds a year; and by 5 Geo. I. c. 8. if a parent run away, and leave his children, the churchwardens and overseers of the parish shall seize his rents, goods, and chattels, and dispose of them towards their relief. It has been held, that the 43 Eliz. c. 2. extends only to relations by blood; and therefore a husband is not bound, even whilst his wife is alive, to support her parents, or children by a former husband, or any other relation. If such second husband do maintain the children of his wife by a former husband, it is a good consideration for a promise by such children to repay, when they come of age, the expence of their maintenance.

But no person is bound to make this provision for his children, unless where the children are unable to work, either through infancy, disease, or accident, and then he is only obliged to find them with necessaries; the penalty on refusing being only twenty shillings a month as before mentioned, which is the greatest allowance which a son can be obliged to make an aged parent, or a parent a legitimate child, by our law.

By 1 Ann. st. 1. c. 30. if Jewish parents refuse to allow their Protestant children fitting maintenance, suitable to the fortune of the parent, the lord chancellor may make such order therein as he may see proper; and by the 11 & 12 W. III. c. 4. the same is enacted as to Popish parents with respect to their Protestant children.

It is also the duty of parents to protect their legitimate children; and therefore a parent is permitted to support his children in law-suits, without being guilty of maintenance; he may also justify assault and battery in defence of the persons of his children.

The last duty of parents is to educate their children; and it is therefore provided by 1 Jac. I. c. 4. and 3 Jac. I. c. 5. that if any person send any child under his government beyond the seas, either to prevent its good education in England, or in order to enter into or reside in any Popish college, or to be instructed, persuaded, or strengthened in the Popish religion, he shall forfeit 100*l*. And by 3 Car. I. c. 2. if any parent, or other, shall send or convey any person beyond sea, to be trained up in any priory, abbey,

nunnery, Popish university, college, school, or house of Jesuits, or priests, or in any private Popish family, in order to be instructed in the Popish religion, he shall be disabled to sue in law and equity, or to be executor or administrator to any person, or to enjoy any legacy or deed of gift, or to bear any office in the realm, and shall forfeit all his goods and chattels, and likewise all his real estate for life. But by the 34 Geo. III. c. 32. no person professing the Romish religion, who shall take and subscribe the oaths required by that statute, shall be subject to these penalties.

The father of a child is entitled to the custody of it, though an infant at the breast of its mother, if the court see no ground to impute any motive to the father injurious to the health or liberty of such child, as by sending it out of the kingdom, the father being at the time an alien enemy domiciled in this kingdom, and the mother being an English woman, and apprehensive only that he meant to send the child abroad, but assigning no reason for such her apprehension.

The power of parents over their children is given to enable them to perform their duty; and therefore a parent may lawfully correct his child, being under age, in a reasonable manner. A father has no other power over his son's estate, than as his trustee or guardian; for though he may receive the profits during the child's minority, yet he must account for them when he comes of age. Where the children have independent fortunes, and their parents are not of ability sufficient to maintain them, the court of chancery will decree a proper maintenance out of the estate bequeathed. He may indeed have the benefit of his children's labour while they live with him, and are maintained by him. The legal power of a father (for mother, as such, is entitled to no power at all) over the person of his children ceases at the age of twenty-one; yet till that age arrive, his empire continues, even after his death, for he may by his will appoint a guardian to his children. He may also, during life, appoint a tutor or schoolmaster, who is then *in loco parentis*, and has such a power of restraint and correction as may be necessary to answer the purposes for which he is employed.

The duties of children to their parents also arise from a principle of natural justice and retribution, and a child is justifiable in defending the person, or maintaining the cause of his parent; and by 43 Eliz. c. 2. is compellable, if of sufficient ability, to provide for his support. And this he must do for a wicked and unnatural progenitor, as well as for one who has shewn the greatest tenderness and parental piety.

We are next to consider the case of *illegitimate* children, or *bastards*. A bastard is one who is not only begotten but born out of lawful wedlock; or, if the father and mother be married, is born so long after the death of the husband, that, by the usual course of gestation, he could not be begotten by him. But in the first case, if a child be begotten while the parents are single, and they will endeavour to make an early reparation for the offence by marrying within a few months after, our law is so indulgent as not to bastardize the child, if it be born, though not begotten, in lawful

wedlock. And in the second, though the usual course of gestation is forty weeks, the law is not exact as to a few days. If a man die, and his widow soon after marry again, and a child be born within such time as that by the course of nature it might have been the child of either husband, in this case he is said to be more than ordinarily legitimate; for he may, when he arrives at years of discretion, choose which of the fathers he pleases.

So if the husband be out of the kingdom (or, as the law somewhat loosely phrases it, *extra quatuor maria*) above nine months, so that no access to his wife can be presumed, her issue during that period will be bastards. So if from circumstances a natural impossibility can be shewn that the husband could be the father of the child of which his wife is delivered, whether arising from his being under the age of puberty, or from his labouring under disability occasioned by natural infirmity, or from length of time elapsed since his death, these are grounds on which the illegitimacy of the child may be founded. And the courts have held that the legitimacy or illegitimacy of the child of a married woman living in a notorious state of adultery, is a question for a jury to determine. But generally during the coverture, access of the husband shall be presumed.

In a divorce *a mensâ et thoro*, if the wife breed children, they are bastards, unless access be proved; but in a voluntary separation by agreement, the law will suppose access, unless the negative be shewn. Likewise, in case of divorce in the spiritual court a *vinculo matrimonii*, all the issue born during the coverture are bastards; because such divorce is always upon some cause that renders the marriage unlawful and null from the beginning.

The duty of parents to their bastard children is principally that of maintenance; and therefore the legislature has ordained, that when a woman is delivered, or declares herself with child of a bastard, and will, by oath before a justice of the peace, charge any one with having gotten her with child, the justice shall cause such person to be apprehended and committed till he give security by bond, either to maintain the child (but they cannot compel him to give security for the performance of a bond), or appear at the next quarter sessions to dispute and try the fact. But if the woman die, or be married before the delivery, or miscarry, or prove not to have been with child, or the justices at the sessions, upon hearing all the circumstances of the case, shall be of opinion that he is not the father of the child, he shall be discharged; otherwise the sessions, or two justices out of sessions, upon original application to them, may make order for the keeping of the bastard, by charging the mother or the reputed father with the payment of the money, or other sustentation for that purpose. And if such putative father, or lewd mother, run away from the parish, the overseers, by the direction of two justices, may seize their rents, goods, and chattels, in order to bring up the said bastard child. Yet such is the humanity of our laws, that no woman can be compulsively questioned concerning the father of her child till one month after her delivery.

Any justice near the parish, on application of the reputed father in custody, shall summon the overseer to shew cause against his being discharged; and if no order be made, in pursuance of the 43 Eliz. c. 2. for the maintenance of the child, within six weeks after the woman's delivery, he shall be discharged.

A bastard can have no rights but what he may acquire; for he can inherit nothing, being looked upon as the son of nobody; yet he may gain a name by reputation, though he has none by inheritance. All other children have their primary settlement in their father's parish, but a bastard in the parish where born. However, in case of fraud, if a woman be sent by order of justices, or come to beg as a vagrant, to a parish to which she does not belong, and drops her bastard there, the bastard shall, in the first case, be settled in the parish from whence she was illegally removed; or, in the latter case, in the mother's own parish, if the mother be apprehended for her vagrancy; 17 Geo. II. c. 5. Bastards also born in any licensed hospital for pregnant women are settled in the parishes to which the mothers belong: 13 Geo. III. c. 82. The incapacity of a bastard consists principally in this, that he cannot be heir to any one, neither can he have heirs out of his own body: for being *nullius filius*, he is therefore of kin to nobody, and has no ancestor from whom any inheritable blood can be derived. But though civil policy renders it necessary to incapacitate a bastard from inheriting, yet he may be made legitimate and capable of inheriting by act of parliament.

CHAPTER XI.

Of Guardian and Ward.

GUARDIANS are of six kinds:—1. Guardians by nature; 2. Guardians for nurture; 3. Guardians in socage; 4. Guardians by testament; 5. Guardians by custom of particular places; 6. Guardians by election of the infant.

1. *Guardians by nature.*—The father, mother, and every other ancestor of an infant, may, in particular cases, be entitled to be his guardian; the father, however, has the first title to such guardianship, and the mother the second. As to other ancestors, it is said that where an infant happens to be heir apparent to two, as a grandfather by the father's side, and likewise a grandfather by the mother's side, he who happens first to have possession of the infant's person, shall be his natural guardian.

Guardianship by nature extends to the person only of the infant, and continues till the age of twenty-one years in males, and to that age or marriage in females.

2. *Guardians for nurture.*—Guardianship for nurture belongs to the parents; but, in default of them, the ordinary usually assigns some discreet person to take care of the infant's personal estate, and to provide for his maintenance and education.

Guardianship for nurture extends no further than the custody and government of the infant's person, and determines at the age of fourteen, both in males and females.

3. *Guardians in socage.*—Guardians in socage are also called guardians by the common law. These take place only when the minor is entitled to some estate in lands, and then by the common law the guardianship devolves upon his next of kin, to whom the inheritance cannot possibly descend, as where the estate descended from his father, in this case the uncle by the mother's side cannot possibly inherit this estate, and therefore shall be the guardian. For the law judges it improper to trust the person of an infant in his hands who may by possibility become heir to him, that there may be no temptation, or even suspicion of temptation, for him to abuse his trust.

This species of guardianship being a personal trust, wholly for the infant's benefit, is neither transmissible by descent, grant, nor devise; if, therefore, the guardian in socage die, or become incapable of performing his trust, the guardianship devolves on the next nearest of kin to the infant. But yet where a woman is guardian in socage, and marries, her husband will in her right become the infant's guardian.

This guardianship, like that for nurture, ends upon the infant's attaining the age of fourteen, whether male or female, unless the female marry, in which case her wardship ceases; for then, in both cases, the infant is presumed to have discretion, so far as to choose his own guardian. This he may do, unless one be appointed by the father, by virtue of the 12 Car. II. c. 24.

4. The power of appointing these guardians by statute, or, as they are usually called *testamentary guardians* arises from the construction of 4 & 5 Phil. & Mar. c. 8. by which the father was allowed the privilege of assigning a guardian, either by deed or will, to any woman child under the age of sixteen; but by the before-mentioned statute, 12 Car. II. c. 4. it is expressly enacted, that any father, under age, or of full age, may by deed or will dispose of the custody and tuition of his child, either born or unborn, to any person, except a Popish recusant, either in possession or reversion, until such child attain the age of one and twenty years. And the person or persons to whom the custody of such child is so devised may take into his custody, for the use of such child, the personal and real estate of the infant till the age of twenty-one years, or any less time, and bring actions relative thereto.

5. There are also *special guardians*, by custom of London and other places. By the custom of London, if the father is a freeman of London, he cannot devise the disposition of the body of his child; but the court of orphans, which is held by custom before the mayor and aldermen of London, shall have the custody of the

body and goods of the child of every freeman or free-woman within age and unmarried. And though the executors have been bound in the spiritual court, yet they may be compelled to give other security to the chamberlain to the use of the orphans.

6. Another species of guardians is that *by the election of the infant himself*, in case he has no guardian appointed him. The form of the election is immaterial; but it should be made in writing, under the infant's hand and seal.

The power and reciprocal duty of a guardian and ward are the same *pro tempore* as that of a father and child.

The same policy, by which the law has appointed guardians of infants, has invested them with such an authority and interest over their property as may be conducive to the infant's benefit. All lawful acts done by the guardians during the infant's minority are good, and may subsist after the authority by which they were done has determined. As, if leases for years of an infant's estate made by a guardian in socage extend beyond the term of his minority, they may become valid and unavoidable by the infant's acceptance of rent from the lessee, or any other act shewing an acquiescence in the lease; for they are not absolutely void on his attaining his full age, but only voidable by him at his option.

But this power does not extend to a testamentary guardian, or a guardian for nurture; for the power of the former extends no further than to the preservation of the infant's estate in safe custody, unless greater powers are expressly given him by the testator; and the latter has only the care of the person and education of the infant, and nothing to do with his estate.

But this power and authority of a guardian being confined to such acts as are apparently for the infant's benefit, a guardian cannot change the nature of the infant's estate, unless it be manifestly for the ward's benefit.

But where an estate descends to an infant subject to incumbrances, the guardian may and ought to apply the profits to keep down the interest, as he may also to pay off a mortgage-judgment, or any other direct and immediate charge upon the land; but he cannot for any other real incumbrance.

The most usual remedy a ward has against his guardian for abuse of trust is by application to the Court of Chancery; to which the power of determining the right of guardianship, who is the next of kin, and who the proper guardian; of making orders on petition or motion for the provision of infants during any dispute on these points; of removing guardians, or compelling them to give security; and of preventing their committing, and to punish them for abuses committed, upon the person or property of their wards, belong.

And this application may be made by the infant himself upon his attaining the age of twenty-one, or by his *prochein amy*, or next friend, during his minority; and this court will even, in some cases, permit a stranger to the infant to come in and complain of the guardian's abuse of the infant's estate.

But courts of equity will not give validity to any contract be-

tween guardian and ward, unless the terms are indubitably fair and equal, nor even allow any gift or release from a ward to his guardian on his coming of age.

To prevent disagreeable contests, it is now usual for guardians, especially of large estates, to indemnify themselves by applying to the Court of Chancery in the first instance, acting under its direction, and accounting annually before the officers of that court.

CHAPTER XII.

Of Executors and Administrators.

AN executor is he to whom a man commits by will the execution of his last will and testament. And all persons are capable of being executors that are capable of making wills, and many others besides; as *feme coverts*, and infants; nay, even infants unborn, or in *ventre sa mere* may be made executors. But then by the 38 Geo. III. c. 87. § 6. such executors shall be granted to the infant's guardian, or such other person as the spiritual court shall think fit, until the infant has attained the full age of twenty-one years. In like manner, it may be granted *durante absentia*, or *pendente lite*; when the executor is out of the realm, (38 Geo. III. c. 87. § 1.) or when a suit is commenced in the ecclesiastical court touching the validity of the will, or right of administration. This appointment of an executor is essential to the making of a will; and it may be performed either by express words, or such as strongly imply the same. But if the testator make an incomplete will, without naming any executor, or if he name incapable persons, or if the executors named refuse to act, in any of these cases the ordinary may grant administration *cum testamento annexo* to some other person; and then the duty of the administrator, as also when he is constituted only *durante minore etate*, &c. of another, is very little different from that of an executor.

With respect to the distinction between executors and administrators, it may be observed, that the power of an executor is founded on the special confidence and actual appointment of the deceased by his will; but an administrator is merely an officer of the ordinary, prescribed to him by act of parliament, in whom the deceased had reposed no trust at all, and whose power over the effects of the deceased arises from several statutes made for that purpose, and on whose death it results back to the ordinary to appoint another, who is then called an administrator *de bonis non*, that is, of the goods not administered by a former administrator. And in such case the administrator is the only legal representative of the deceased.

Executors are of two sorts; a rightful executor, and a wrongful executor, called in law an executor *de son tort*: the former is appointed by the will of the testator: the latter takes upon himself the office of executor by intrusion, without being constituted by the testator or the ordinary.

A wrongful executor is liable to all the trouble of an executor, without any of the profits or advantages. But merely doing acts of necessity, prudence, or humanity, as locking up the goods, or burying the deceased, or feeding his cattle, will not amount to such an intermeddling as will charge a person with the consequences of being an executor of his own wrong. Neither will the bare possession of goods make a man an executor of his own wrong, unless he undertaké to do some acts which an executor only can lawfully do, as to release the debts of the testator, &c. Such an one cannot bring an action himself in right of the deceased, but is liable to answer to the executors, as also to the creditors and legatees of the deceased, to the amount of the testator's goods, which he shall have improperly administered; and will also be liable to an action, unless he deliver over the intestate's goods to the rightful administrator, before a suit be commenced against him. In equity, however, he will be allowed all such payments as a rightful executor ought to have paid, unless perhaps on a deficiency of assets the rightful executor is prevented from satisfying his own debt.

An executor of his own wrong cannot retain the property of the intestate in discharge of his own debt, though of a superior degree. But if an executor of his own wrong possess himself of goods, and afterwards administration is granted him, he may by virtue thereof retain goods for his own debt.

If a creditor take an absolute bill of sale of the effects of his debtor, and agree to leave them in his possession for a limited time, and in the mean time the debtor die, whereupon the creditor sells the goods, he thereby becomes an executor *de son tort*.

But a person who possesses himself of the effects of the deceased, under the authority and as agent for the rightful executor, cannot be charged as an executor *de son tort*.

Neither if, after the executor has proved the will, and administered, a stranger takes any of the goods, and, claiming them as his own, uses and disposes of them accordingly, this will not make him, in construction of law, an executor *de son tort*: because there is a rightful executor, who may be charged with these goods so taken from his possession as assets, and to whom the stranger will be answerable in trespass for taking the goods.

In the appointment of an executor, though it is usual expressly to name him as such in the will, yet any words which imply the testator's intention that a person shall have the execution of his will, will be sufficient. And as such appointment may be of part or the whole of the testator's estate, if the executorship expire before the effects have been completely distributed, the ordinary may grant administration of the remainder.

The interest vested in the executor by the will of the deceased

may be continued and kept alive by the will of the same executor; so that the executor of A's executor (if A's executor has proved the will) is to all intents and purposes the executor and representative of A himself, 25 Edw. III. st. 5. c. 5. But the executor of A's administrator, or the administrator of A's executor, is not the representative of A.

In these cases, when the course of representation from executor to executor is interrupted by an intestacy, it becomes necessary that the ordinary should grant a new administration of the goods of the deceased not administered by the former executor or administrator, as the case may be; which new administrator is; as we have already seen, called an administrator *de bonis non*.

The cases in which administration *de bonis non* is necessary are—1. When the executor of the deceased, having proved the will, dies intestate. 2. Where there are several executors, and the surviving executor having proved the will dies intestate. 3. Where an administrator dies before he has administered the whole personal estate of the deceased.

But though a person is appointed executor by will, he cannot be compelled to undertake the executorship against his own desire, unless he has, after the death of the testator, performed those acts which are proper for an executor, as by paying debts due from the testator, or receiving any debts due to him, or giving acquittances for the same, or other such like acts; for then he is not only compellable to perform the office of an executor, but even if he should refuse so to do, his refusal will be void. Yet where a person is not compellable to accept the executorship, if he refuse to take upon himself the execution of the will, he shall lose any legacy which is bequeathed to him, unless it is probable, from nearness or kindred or other circumstances, the testator would nevertheless have given the legacy. However, where a legacy is left to a person as executor by the will, he may take time to consider whether he will accept the executorship or not, and in the mean time the ordinary may grant letters to any discreet person to collect in the effects of the deceased. And it has been held, that if an executor has accepted of the executorship, he will be entitled to a legacy given to him in that character, though he die before probate of the testator's will.

If there are many executors of a will, and only one of them prove the will, and takes upon him the executorship, it is sufficient for them all; and even after the death of their fellow executor, the right of executorship survives to them. But if all the executors refuse to prove the will, they cannot afterwards administer, or in any respect act as executors; but before they are thus incapacitated, they must be twice cited. It is, however, to be remarked, that executors refusing to act must be joined in all suits where the executors who have proved are made plaintiffs, because they are all privy to the will; though it is not necessary where they are defendants, because the plaintiff in any action against them is not bound in law to take notice of any but those who have proved the will.

If two executors be appointed by will, and one of them prove the will in the name of both, without the consent of the other, this will not bind him who refused the executorship, unless he administer. But see Cro. Eliz. 93. and 2 Anst. 594. where an account was directed against two executors, though the will had been proved but by one of them. But if he once administer, he cannot afterwards renounce, for he has made his election.

And if an executor take out administration, or be sworn, but afterwards refuse to administer, the ordinary cannot grant administration to any other during his life. He may, however, issue process to compel him to prove.

Neither can the ordinary set aside an executor for any disability at law, as on his becoming bankrupt: nor can he insist on his giving security; for the executor, being appointed by the testator, has been considered by him as a qualified person. But if an executor become subject to any natural disability, as to insanity, idiotism, or the like, the spiritual court will grant administration. And if it appear that the executor is wasting the goods of the testator, the Court of Chancery will, on the application of a creditor, appoint a receiver of the testator's effects, in order to protect them.

If a creditor constitute his debtor his executor, it is in law a release or discharge of the debt, whether the executor act or not, provided there be assets sufficient to pay the testator's debts; for though the discharge of the debt shall take place of all legacies, yet it will not be allowed against the testator's creditors. But it is otherwise in equity, for there the appointment of a debtor as executor is only a discharge of the action at law, and not of the debt.

If there be several joint debtors, and the creditor make one of them an executor, the debt is extinguished in law: nor is this consequence varied by the fact of the debtor's administering or not administering; the reason whereof is, that the other cannot bring an action without joining him who refuses, and they cannot sue one of themselves for a personal thing. And on this principle, if a woman, whose husband is indebted to the testator, be made executor, the husband's debt is thereby released.

If executors retain money in their hands longer than is necessary, they shall be chargeable with interest, and costs, if any have been incurred. But one executor shall not be accountable for money received, or detriment occasioned by his co-executor, unless it has been by means of some joint act done by them.

We have seen, that if the testator make an incomplete will, without naming any executors, or if he name incapable persons, or if the executors named refuse to act; in any of these cases the ordinary must grant administration with the will annexed to some other person. But where a person dies wholly intestate, it is provided by the 31 Edw. III. c. 11. that the ordinary shall depute an executorial power to the nearest and most lawful friends of the deceased, to administer his goods; and these are interpreted to be the next of blood to the intestate, not being under any legal

disability. These administrators are also, by the same statute, put upon the same footing, with regard to suits and to accounting, as executors appointed by will. The 21 Hen. VIII. c. 5. enlarges the power of the ecclesiastical judge a little more, permitting him to grant administration either to the widow or the next of kin, or to both of them, at his discretion; and where two or more persons are in the same degree of kindred, the statute gives the ordinary the election to accept which he pleases.

The rules for ascertaining the next of blood, or, as it is usually called, the next of kin, are as follow:—

1. The ordinary is compellable to grant administration of the goods of the wife to the husband or his representative; and of the husband's effects to the widow, or next of kin, or to both, at his discretion.
2. That, among the kindred, those are to be preferred, who are the nearest in degree to the intestate; but, of persons of equal degree, the ordinary may choose which he pleases.
3. That this nearness of degree shall be reckoned according to the computation of the civilians, and not of the canonists; because in the civil computation the several degrees are numbered from the testator himself, and not from the common ancestor, according to the rule of the canonists. And therefore, in the first place, the children, or on failure of children the parents of the deceased, are entitled to administration: both which are indeed in the first degree, but the children are allowed the preference. Then follow the brothers, grandfathers, uncles, or nephews, and the females of each class respectively; and lastly, cousins.
5. The half-blood is entitled to the administration as well as the whole, for they are equally of the kindred of the intestate, and only excluded from the inheritance of the land for feudal reasons. Therefore the brother of the half blood will exclude the uncle of the whole blood; and the ordinary may grant administration to the sister of the half, or the brother of the whole blood, at his discretion.
5. If none of the kindred of the testator will take out administration, a creditor may do it.
6. And by the 38 Geo. III. c. 87. if, at the end of twelve months from the death of the testator, the executor to whom the probate shall have been granted is residing out of the jurisdiction of the king's courts, a creditor may, on application, obtain letters of administration, for the purpose of having his demand satisfied out of the assets of the testator.
7. If the executor refuse, or die intestate, administration may be granted to the residuary legatee, in exclusion of the next of kin.
8. And lastly, the ordinary may, in defect of all these, commit administration (as he might have done before the 31 Edw. III. c. 11.) to such discreet persons as he approves of; or he may (in these cases, as well as that of the executor's refusal) grant to any one letters to collect in the effects of the deceased, which neither makes him executor nor administrator; his own business being to keep the goods in his safe custody, and do other acts for the benefit of the persons entitled to the property of the deceased.

Where two or more administrators are appointed, one of them

cannot, as in the case of executors, act alone, release the debts of the intestate, or otherwise dispose of his property; but they must all join in such release or disposition; for the authority delegated to them by the ordinary is a joint and not a several authority.

If a bastard die intestate, and without wife or children, or if any other person die without kindred, the king is entitled to the personal property as administrator. But, in the case of a bastard, it is now usual for the crown to grant administration to some relation of the bastard's father or mother, reserving a tenth part or some other small portion, by way of preserving its rights.

If a married woman, as next of kin, has a right to administer, the administration ought not to be granted to the husband and wife jointly, but to the wife only. But if a wife, who, as a residuary legatee, has a right to take administration; refuse so to do, it may be granted to her husband, he being entitled to all she would have as residuary legatee.

By 22 & 23 Car. II. c. 10. the administrator, on his appointment, enters into a bond, with two sureties, to the satisfaction of the ordinary, for duly administering the testator's effects; and should he neglect the requisitions of the bond, he may, with the permission of the ordinary, be sued by any of the creditors or next of kin to the deceased.

The duties and office of executors and administrators are very much the same; excepting, first, that the executor being appointed by will is bound to perform that will, which an administrator is not, unless where the will is annexed to his administration, and then he differs still less from an executor; and, secondly, that an executor may do several things before he proves the will, but an administrator can do nothing till letters of administration are granted him; for the former derives his power from the will, and not from the probate, the latter owes his entirely to the appointment of the ordinary.

The first thing necessary to be done by an executor or administrator is to bury the deceased in a manner suitable to his rank in life, and the estate he has left behind him. Necessary funeral expences are allowed, in preference to all other debts and charges; but if the executor or administrator is extravagant, it is a waste of the effects of the deceased, which shall be prejudicial to themselves only, and not to the creditors and legatees of the deceased.

The next duty of an executor or of an administrator appointed during infancy, absence, litigation, or administration with the will annexed, is to prove the will of the deceased; which is done either in common form before the ordinary, or his deputy, by the oath of such executor or administrator, or, as it is said, in some of the dioceses in York, with the additional oath of one witness. But if the validity of the will be disputed, it then becomes necessary to prove and establish the will in the solemn way or form, that is, by witnesses, in the presence of such persons as would be interested if the deceased had died intestate. Two witnesses must then be

sworn and examined on interrogatories administered by the adverse party, who must be able at least to depose, that the testator declared the writing produced to be his last will and testament; unless where the will or codicil was written by the testator himself, and then the evidence of one witness, who can attest the fact of the identity, will suffice.

There is a substantial difference of effect, however, between these two forms of proving wills; for, after an informal proof, the executor may be compelled again to prove the will in the form of law. The executor may, therefore, for greater safety, if he himself have an interest in the will, elect to have the will proved in the solemn form; and in such case he must cite the persons who would be interested under an intestacy, to be present at the proof thereof. If the will is proved only in the common form, it may at any time within thirty years be disputed: but if the solemn form is pursued, and no adverse proceedings are instituted within the time limited for appeals, the will is liable to no future controversy.

When the will is proved, the original must be deposited in the registry of the ordinary, and a copy thereof is made upon parchment, under the seal of the ordinary, and delivered to the executor or administrator, together with a certificate of its having been proved before him: and this is called a *probate*.

In defect of any will, the person entitled to be administrator must also at this period take out letters of administration, under the seal of the ordinary; whereby an executorial power to collect and to administer, that is, to dispose of the goods of the deceased, is vested in him. And, to prevent delay in the administration of the effects of the deceased, it is provided by 27 Geo. III. c. 9. § 10. that if any person administer the personal estate of another dying, without first proving the will of the deceased, or taking out letters of administration within six calendar months after the person's decease, he shall forfeit 50*l.* to be sued for within six months after the time when the probate or administration ought to have been taken.

By the 92d canon of the church, 1603, it is ordained, that if all the goods of the deceased lie within the same diocese, a probate is to be made, or administration taken out, before the ordinary or bishop of the diocese where the deceased lived; but if the deceased had *bona notabilia*, that is, personal property of the value of 5*l.* in several dioceses or jurisdictions, the will must be proved, or administration taken out, in the prerogative or metropolitan court of the province in which the deceased died, by way of special prerogative: and every probate or administration, not so granted, is declared void. If the *bona notabilia* be in different dioceses of different provinces, administration must be taken out in the archiepiscopal court of each province. But if they lie in one diocese of each province, administration may be granted by the bishop of each diocese of such *bona notabilia* as are within his jurisdiction.

By the 93d canon, goods in different dioceses, unless of the value of 5*l.* shall not be accounted *bona notabilia*.

Bonds and other specialties are *bona notabilia* in the diocese where they happen to be at the time of the death of the testator or intestate. But simple contract debts and securities are such only in the diocese where the debtor then resided.

After obtaining the probate, the executor or administrator must immediately proceed to make an inventory of all the goods and chattels, whether in possession or action, of the deceased; which, if required, must be delivered to the ordinary upon oath, in the presence of two credible witnesses; and to which, if so delivered, no creditor is at liberty to object: statute 21 Hen. VIII. c. 5.

The executor by virtue of the will of the testator, and the administrator by virtue of his administration, are to collect in all the goods and chattels of the deceased, whether real or personal, in possession, as ready money, money in the funds, goods, cattle, stock on farm, or in trade, &c.; or in action, as debts owing to the deceased, securities for money, &c.; and to that end they have large powers and interests conferred on them by law, being the representatives of the deceased, and having the same property in and right to his goods as the deceased had when living, and the same remedies to recover them.

And such goods and chattels, when recovered by the executor or administrator, will be assets in their hands to make them chargeable to creditors, legatees, and the kindred of the deceased, as far as the value of such goods and effects extends, according to the following rules.

The executor or administrator must first pay the debts of the deceased; and, in payment of these, he is bound to observe the rules of the law, which give a preference to them accordingly as they are differently secured; for otherwise, in case there should be a deficiency of assets, and he pay debts of a lower degree first, he will be obliged to answer those of a higher nature out of his own estate. But it is to be observed, that the payment of debts according to their priority applies only to legal assets, that is, such effects of the testator as can be recovered at common law.

First, then, he must pay all necessary funeral charges, the expences of proving the will, or granting letters of administration, and other necessary expences incurred by the execution of his trust. In strictness, no funeral expences are allowed against a creditor, except for the coffin, ringing the bell, parson, clerk, and bearers' fees; but not for the pall or ornaments. But if there are assets sufficient, the allowance is always regulated by the estate and degree of the deceased. 2. He must pay debts due to the king by record or specialty; for the king by his prerogative shall be preferred before any other. 3. Such debts as are by particular statutes to be preferred to all others: as the forfeitures for not burying in woollen; money due from overseers of the poor,

for rates collected by them, and not paid; and money due to the post-office for letters. 4. Debts of record, as judgments (if properly docketed or entered according to the 4 & 5 W. & M. c. 20.) debts due under a decree of a court of equity, and debts due on mortgage; all which debts carry interest to the time of payment, as do also debts on bonds. 5. Recognizances at the common law, statutes merchant and staple, and recognizances in the nature of statutes staple, pursuant to the 23 Hen. VIII. c. 6. This must be understood of recognizances and statutes forfeited, where the recognizances are forfeited, or where they are for keeping the peace, good behaviour, &c. and the statutes are for performing covenants, &c. 6. Debts due on special contract, as for rent in arrear, and debts due on bonds or covenants under seal. But if such bond be proved to have been entered into without any good or valuable consideration, in equity it will be postponed to simple contract debts. 7. Debts on simple contract, as bills of exchange, promissory notes, or verbal promises, as well where the deceased has really promised, as where the law will imply that he has, as for goods bought, &c.; and among these simple contract debts, wages due to servants are first to be paid. 8. And lastly, legacies, &c.

Among debts of equal degree, executors and administrators are allowed to pay themselves their whole debts first. But they are not allowed to retain their own debts to the prejudice of those of a higher degree. Neither can an executor or administrator retain his own debt in preference to that of his co-executor or co-administrator of equal degree: but both shall be discharged in equal proportion.

If no suit be commenced against an executor or administrator, he may pay any one creditor of equal degree his whole debt, though he should in consequence not have a sufficiency remaining to satisfy the rest; for, till a suit be commenced, he has no legal notice of the debt, except debts due on record, which he is bound to take notice of without suit commenced. And although executors and administrators are required to pay debts according to their priority, yet if they have had no notice of debts due upon bond or other specialty, they may pay a simple contract debt before a debt of specialty.

And it has been held, that, even after notice, an executor or administrator may still give a preference to other creditors of the same degree, by confessing a judgment to them before plea. But after a bill is filed by a creditor for a discovery of assets and payment of his debt, the executor or administrator may pay another creditor of equal degree, and *a fortiori* of a higher degree, without confessing a judgment. Sir James Mansfield said, he wished it were generally known (for he believed that lawyers in the courts of law were not aware of it) that through the medium of a court of equity the creditors of a deceased insolvent may always be compelled to take an equal distribution of the assets. It was only necessary for a friendly bill to be filed against the executor

or administrator to account; after which the chancellor would enjoin any of his creditors from proceeding at law.

The course of administration, or payment of the debts according to their priority, applies only to legal assets; but as natural equity requires that all the creditors should be paid equally, when therefore the testator leaves his real estate to trustees, or to executors who thus become trustees for the payment of his debts, these are called equitable assets, because a court of equity will order all the creditors to be paid *pari passu*, or an equal share, out of this fund. Creditors, whose demands are barred at law by the Statute of Limitations will be let in.

And even where specialty creditors have received part of the debts out of their personal estate, a court of equity will restrain them from receiving any part of the equitable fund, till all the other creditors are paid an equal proportion of their debts.

The personal estate is said to be the natural fund for the payment of debts, yet it will be exonerated if the testator leave by his will sufficient real property for the payment of his debts, provided it is the manifest intention that the personal estate shall be exonerated, and that the real estate shall be alone applied to that purpose.

If lands descend to the heir charged by the testator with his debts, they shall be liable to all his debts, although they shall be considered as legal assets, and they shall be paid according to their priority. The equity of redemption of land mortgaged in fee, is equitable assets; for the creditors can have no relief from it, but in a court of equity.

All specialty creditors, where the testator has bound himself and his heirs, have their election, whether they will resort to the heir, who has lands by descent, or to the executor, for payment of their debts; and although a court of equity will not interpose its authority, and compel the specialty creditors to apply to the heir, yet if they exhaust the personal fund, or leave insufficient for the discharge of the simple contract creditors, it will enable these to stand in the place of the specialty creditors, and to recover from the heir at law the amount of what they have drawn out of the personal fund. This is called *marshalling* the assets.

On the principle, that the personal estate is to be primarily applied in discharge of the testator's debts, a mortgage made by the testator must be discharged out of the personal estate, provided there is sufficient to pay the rest of the creditors and legatees.—But though a mortgage is personal in its creation, yet if it has been contracted by another, and not by the testator or intestate himself, it is payable out of the real estate, for the personal estate has received no augmentation thereby.

It being the object of a court of equity, that every claimant upon the assets of a deceased person shall be satisfied as far as such assets can, by any arrangement consistent with the nature of the respective claims, be applied in satisfaction thereof; it has been settled, that where one claimant has more than one fund to

resort to, and another claimant only one, the first claimant shall resort to that fund on which the second has no lien. And therefore if a specialty creditor, whose debt is a lien on the real assets, have received part of his debt out of the personal assets, he cannot receive out of the equitable fund till the simple contract creditors have been paid a portion of their debts, equal to what the personal estate has been exhausted in payment of the specialty creditors.

When the debts of the deceased are all discharged, the legacies are next to be attended to, and are to be paid by the executor or administrator so far as the effects which remain after payment of the debts will extend; but he may not give himself the preference in this case, as he may in the case of debts; but shall have an equal portion with the rest of the creditors.

Executors or administrators so entirely represent the personal estate of the testator or intestate, that they are liable to the payment of all the debts, covenants, &c. of the deceased, so far as the assets which have come to their hands will extend to pay. But it is a principle of law, that an executor, where no default is in him, shall not be bound to pay more for his testator than his goods amount to.

Executors may release, or take a release before a probate, if they prove afterwards. They may commence an action, but they cannot declare in the action before probate; for when they declare, they must produce in court the letters testamentary. They may release, pay, or receive debts, assent to legacies, demise land, and do many other acts before probate.

Each executor has the entire controul of the personal estate of the testator, may release or pay a debt, or transfer any part of the testator's property, without concurrence of the other executor. And it seems that the same rule holds with respect to administrators.

The goods of a testator, in possession of the executor, cannot be taken in execution of a judgment in action brought against the executor in his own right. But if an executrix use the goods of her testator as her own, and afterwards marry, and then the goods are treated as the goods of her husband; they may be taken in execution of the husband's debt.

Executors and administrators have a joint interest in the estate of the deceased. Hence, if there be two or more executors or administrators, and one or more of them die, the administration of the estate of the deceased belongs to the survivor or survivors; and it seems that an action may be brought by a surviving administrator, without procuring a new grant of letters of administration. They are entitled to the same remedies for the recovery of debts and duties due to the deceased, as he himself had while living. But neither they nor the representatives of the deceased can maintain an action against another for any personal injury done to the deceased; for it is a maxim in law, that personal actions die with the person.

But actions arising from a breach of promise, or the like, and which have abated by the testator's death, may be resumed by or against his executors or administrators; for actions of this kind are actions against the property of the deceased, and descend to his representatives.

So, by the 32 Hen. VIII. c. 37. they may sue for rent in arrear, and due to the deceased in his life-time, either in his own right or that of his wife; and may also distrain the lands, &c. charged with the payment of such rent, while they continue in the possession of the tenant, or any person claiming under him by purchase, gift, or descent, in the same manner as the testator might have done during his life.

And by the 11 Geo. II. c. 19. § 15. the executor or administrator of a tenant for life, on whose death any lease of lands, &c. determined, shall, in an action on the case, recover from the under-tenant a proportion of the rent reserved, according to the time such tenant for life lived of the last year, or quarter of a year, or other time in which the said rent was growing due; and if he died on the day on which the same was payable, they shall recover the whole rent.

An acting executor having once received, and fully had under his controul, assets of the testator applicable to the payment of a debt, is responsible for the application thereof to that purpose; and such application having been disappointed by the misconduct of his co-executor, whom he employed to make the payment in question, he is liable for the consequences of such misconduct, as much as if the misapplication had been made by any other agent of a less accredited and inferior description.

By the 29 Car. II. c. 3. § 3. no action shall be brought to charge any executor or administrator upon any special promise, to answer damages out of his own estate, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized.

And the promise, as well as a sufficient consideration to support it, must be expressed in such written memorandum or note.

While an executor is passive, he is chargeable only in respect of the assets; but if he promise to pay a debt of the testator at a future day, he thereby makes it his own debt, and it must be satisfied out of his own estate.

All sperate debts mentioned in the inventory shall be deemed assets in the executor's hands; but the executor may discharge himself by shewing a demand and refusal of them.

Where a defendant binds himself as administrator to abide an award touching matters in dispute between his intestate and another, and the arbitrator awards that the defendant as administrator shall pay a certain sum, it operates as an admission of assets between these parties, and the defendant cannot plead *plene administravit* to an action of debt on the bond.

But mere submission to arbitration is not of itself an admission of assets, unless the arbitrator order the administrator to pay the amount of the demand ascertained on the reference.

Should the executor or administrator find the assets of the deceased very much incumbered with debts, so as to render it unsafe for him to administer them of his own discretion, he may apply to a court of equity to have them arranged according to their real priority.

If the property of the deceased be lost, or have become irrecoverable through the wilful negligence of the executor or administrator, such executor or administrator will be liable to make it good, unless it appear that he took all reasonable care to prevent such loss or defalcation.

Special bail is not required of executors or administrators, in any action brought against them for the debts of the deceased, except where they have wasted the goods of the deceased. Nor shall costs be had against them.

CHAPTER XIII.

Of Infants.

THOUGH a person be styled in law an *infant* till he attain the age of twenty-one years, which is termed his full age, yet there are many actions which he may do before that age, and for which various terms and ages are appointed. Thus, a male at twelve years old may take the oath of allegiance; at fourteen, he is at years of discretion, and therefore may disagree or assent to marriage, may choose a guardian, and, if his discretion be actually proved, may make his testament of his personal estate; at seventeen, may be an executor; and at twenty-one, is at his own disposal, and may aliene his lands, goods, and chattels. A female also at seven years of age may be betrothed or given in marriage; at nine, is entitled to dower; at twelve, is at years of maturity, and therefore may consent or disagree to marriage, and, if proved to have sufficient discretion, may bequeath her personal estate; at fourteen, is at years of legal discretion, and may choose a guardian; at seventeen, may be executrix; and at twenty-one, may dispose of herself and her lands. So that the full age in male or female is twenty-one years, which age is completed on the day preceding the anniversary of a person's birth. If, therefore, one be born on the 1st of January, he is of age to do any legal act on the morning of the last day of December, though he may not have lived twenty-one years by nearly forty-eight hours.

But though the age of consent to marriage in an infant male is fourteen, and in a female twelve, yet they may marry before; and if they agree thereto when they attain these ages, the marriage is good: but they cannot disagree before then. And if one of them be above the age of consent, and the other under such age, the party so above the age may as well disagree as the other; for both must be bound, or neither.

Infants have various privileges, and various disabilities; but their very disabilities are privileges, in order to secure them from hurting themselves by their own improvident acts. An infant cannot be sued but under the protection, and joining the name of his guardian, for he is to defend him against all attacks, as well by law as otherwise; but he may sue by his guardian, or *prochein amy*, as before mentioned. In criminal cases, an infant of the age of fourteen years may be capitally punished for any capital offence; but under the age of seven he cannot. The period between seven and fourteen is subject to great uncertainty; for the infant shall, generally speaking, be judged *prima facie* innocent; yet if he was *doli capax*, and could discern between good and evil, at the time of the offence committed, he may be convicted and undergo judgment and execution of death, though he has not attained to years of puberty or discretion. And Sir Matthew Hale gives two instances, one of a girl of thirteen, who was burned for killing her mistress; another, of a boy still younger, that had killed his companion, and hid himself, who was hanged; for it appeared by his hiding, that he knew he had done wrong, and could discern between good and evil; and in such cases the maxim of the law is, that *malitia supplet ætatem*. So also, in much more modern times, a boy of ten years old, who was guilty of a heinous murder, was held a proper subject for capital punishment, by the opinion of all the judges.

With respect to estates and civil property, an infant has many privileges, which will be better understood when we come to treat more particularly of these matters; but this may be said in general, that an infant shall lose nothing by non-claim or neglect of demanding his right; nor shall any other *laches* or negligence be imputed to an infant, except in some very particular cases, *viz.* in case of a fine, where the time begins in the life of the ancestor, or of an appeal of death of his ancestor, where he brings not his appeal within a year and a day, &c.

It is generally true, that an infant can neither aliene his lands, nor do any legal act, nor make a deed, nor indeed any manner of contract, that will bind him. But still to all these rules there are some exceptions. And first, it is true that infants cannot aliene their estates; but infant trustees or mortgagees are enabled to convey under the direction of the Court of Chancery or Exchequer, or other courts of equity, the estates they hold in trust or mortgage, to such persons as the court shall appoint; 7 Ann. c. 19. and 4 Geo. III. c. 16. Also, it is generally true, that an infant can do no legal act; yet an infant, who has an advowson, may present to the benefice when it becomes void. For the law in this

case dispenses with one rule, in order to maintain others of far greater consequence: it permits an infant to present a clerk (who, if unfit, may be rejected by the bishop), rather than either to suffer the church to be unserved till he come of age, or permit the infant to be debarred of his right by lapse to the bishop. An infant may also purchase lands: but this purchase is incomplete; for when he comes of age, he may either agree or disagree to it, as he thinks proper, without alleging any reason; and so may his heirs after him, if he die without having completed his agreement. It is farther generally true, that an infant, under twenty-one, can make no deed but what is afterwards voidable; yet in some cases he may bind himself by deed indented, or indentures, for seven years; and he may by deed or will appoint a guardian to his children, if he has any. 12 Car. II. c. 24.

As to contracts for necessities made by infants, it is to be observed (strictly speaking) that all contracts made by infants are either void or voidable, because a contract is the act of the understanding, which, during their state of infancy, they are presumed to want; yet the law has so far supplied that defect, and taken care of them, as to allow them to contract for their benefit and advantage, with power, in most cases, to recede from and vacate it when it may prove prejudicial to them: but in this contract for necessities they are absolutely bound, and this likewise in benignity to infants.

Therefore it is clearly agreed, that an infant may bind himself to pay for his necessary meat, drink, apparel, physic, and other necessities, as likewise for his good teaching and instruction. This binding means by parole; for as an infant is not bound by any bond, note, or bill, which he may give, even for necessities, the law implies a promise by the infant for payment for the necessities furnished for his maintenance, where no promise hath been made. With respect to schooling, &c. the infant is bound in cases only where the credit was *bonâ fide* given to him. In all cases, however, where the infant is *sub potestate parentis*, and is living in the same house with his parents, he will not then be liable even for necessities.

It must also appear that the things were actually necessary, and of reasonable prices, and suitable to the infant's degree and estate, which regularly must be left to the jury; but if the jury find that the things were necessary, and of reasonable price, it shall be presumed that they had evidence for what they thus find; and they need not find particularly what the necessities were, nor of what price each thing was: also, if the plaintiff declares for other things as well as necessities, or alleges too high a price for those things that are necessary, the jury may proportion their damages according to their intrinsic value.

An infant is not chargeable on a contract for goods supplied for the purpose of carrying on trade, whereby he derives a support. Neither is an infant liable for money which he borrows to lay out for necessities, though he actually does lay it out for necessities; for it is upon the lending that the contract must arise,

and after that time there could be no contract raised to bind the infant, because after that he might waste the money; and the infant's applying it afterwards for necessaries will not, by matter *ex post facto*, entitle the plaintiff to an action. In such case the only way for the lender to have a claim upon the infant is, either to lay out the money lent himself, or to see that it is laid out in necessaries. But though the infant be not liable at law, he is in equity; and the lender of the money stands in the place of the creditor for necessaries.

Necessaries for an infant's wife are necessaries for him; but if provided for the marriage, he is not chargeable, though she use them after. So an infant is liable for the nursing of his child.

Debts contracted during infancy form, however, a good consideration to support a promise made to pay them when a person is of full age. And where the defendant pleads infancy, and the plaintiff replies that the defendant confirmed the promise or contract when he was of age, the plaintiff need only prove the promise, and the defendant must discharge himself by proof of the infancy.

Though a promise by an infant will not bind him unless for necessaries, yet he may take advantage of any promise made to him, though the consideration was his promise when an infant. And an infant plaintiff has been allowed to recover on mutual promises of marriage.

Infants are still a further object of the care of the laws. An infant-unborn, or, according to the legal expression, *en ventre sa mere*, is supposed in law to be born for many purposes. It is capable of having a legacy, or a surrender of a copyhold estate, made to it. It may have a guardian assigned to it; and it is enabled to have an estate limited to its use, and to take afterwards by such limitation, as if it were then actually born. It may have a distributive share of intestate property, even with the half blood; it is capable of taking a devise of land; it takes, under a marriage settlement, a provision made for children living at the death of the father. And it has lately been decided, that a marriage and the birth of a posthumous child amount to a revocation of a will executed previous to the marriage. So, in executory devises, it is considered as a life in being. It takes land by descent, though in that case the presumptive heir may enter and receive the profits for his own use till the birth of the child.

CHAPTER XIV.

Of Trustees.

TRUSTEES not having the whole power, and being obliged to join in receipts, one is not chargeable for money received by the other. In the case of executors, according to the old law, it was otherwise. But, by a modern decision, the rule respecting an executor's liability for the misapplication by his co-executor of money for which their joint receipt had been given, has been in some degree relaxed.

But where trustees so join in a receipt, that it cannot be distinguished what was received by one, and what by the other, there they shall both be charged with the whole. So where one trustee having received the trust-money handed it over to his companion, he was charged; for where by any act, or by any agreement of the trustee, money gets into the hands of his companion, whether a trustee or co-executor, they shall both be answerable. Also if a trustee be privy to the embezzlement of the trust fund by his companion, he shall be charged with the amount.

It seems now to be settled, notwithstanding some old determinations to the contrary, that a trustee or executor is chargeable in equity with interest on the trust fund in his hands, wherever it appears he has made interest; and not only so, but if it appear that he has employed the trust money in trade, whence he has derived profits beyond the rate of interest, he shall account for the whole of such profits; and still farther, if a trustee or executor, retain money in his hands for any length of time, which he might, by application to the court, or by vesting it in the funds, have made productive, he shall be charged with interest thereon.

A trustee is not entitled to any allowance for his trouble in the trust, but he will be paid his costs in case of an unfounded suit against him.

A trustee robbed by his own servant shall be discharged of it on account. But great negligence in collecting in the debts under the trust deed may charge him with more than he has received in the trust.

CHAPTER XV.

Of Partners.

MERCANTILE associations are either public or private. In both cases the individual partners are liable for the debts of the joint trade without limitation, unless when incorporated by royal charter, or act of parliament; and then the members are liable for their respective shares or interest in the joint stock.

If a person suffer his name to be used in a business, and hold himself out as a partner, he is to be so considered, whatever may be the agreement between him and the other partners, and although it was not known at the time of the dealing that he was a partner, or that his name was used.

And the law is the same with respect to dormant or sleeping partners, who, when discovered, are liable to the partnership debts, because, were they not liable, they would receive usurious interest.

As to the interest which partners have by law in the goods or capital which they contribute at the commencement of the partnership, or acquire in the course of trade, it is held by the *lex mercatoria*, that the partners have all the same species of interest in the stock in trade; and that, after an agreement executed between the parties, the stock and effects which are put into partnership become common to all the partners, although they remain in possession of that partner who was the owner of them before the partnership commenced.

And this community of interest extends not only to such partnership stock as may be brought into trade at the time of entering into partnership, but to all such as may at any time arise in the course of the partnership dealings. But to whatever share a partner may be entitled, he has no exclusive right to it until a balance of accounts be struck between him and his co-partners.

As to the controul of partners over partnership property, it depends upon the articles of partnership. But if there has been no express stipulation between them, the majority must decide as to the disposition and management of the partnership concerns.

Of the power of transferring partnership property, it is to be observed, that where there is any chattel, house, or real estate, held for the purpose of partnership business, no partner can dispose of more than his own share in them. But with regard to all effects contributed, manufactured, or purchased, to be sold for the benefit of the partners, each partner in the course of trade has an absolute

right to dispose of the whole; and such sale is valid on the part of the vendee, if transacted without collusion.

A secret act of bankruptcy by one partner does not take away the power of the other to dispose *bonâ fide* of the goods which belonged to them.

A promise or undertaking to one of several partners in the course of business is construed by law to be made to all of them, and all are entitled to take advantage of it.

But though contracts in the course of business with part of a firm are considered as for the benefit of all the members composing it, yet there is no transmission of rights to successors in a mercantile house; and all running agreements with a partnership cease, when any change takes place by death, the retiring of one partner, or the admission of another, in the set of partners existing at the time when the agreements were concluded.

If a contract be entered into by one partner in contravention of the laws of this country, without the privity or personal participation of his co-partners; as if goods are packed by him in a particular manner for the purpose of smuggling; neither the person entering into such illicit contract, nor his copartners, can recover on it. And it makes no difference if the party who made the contract lives abroad, if his co-partners reside in England.

Each partner is not only entitled to his proportion of the partnership estate according to express agreement of what he originally contributed, but he has a lien upon it for any sums of money advanced by him to, or owing to him from, the partnership. And this extends even to property in ships.

If one partner pay a debt arising out of a legal contract, for which the partnership was liable, he has an action against the other for a contribution. But if partners should be engaged in any thing *malum in se*, one of them could not acquire a right of action by paying a sum of money which they had jointly promised to a third person in the course of their immoral transactions.

A distinction, however, has been taken between a debt arising out of a prohibited transaction paid by one partner, with or without the consent of the other.

When the contract is not morally bad, its illegality arising only from its being prohibited by a positive statute, it has been held, that a debt paid by one partner with the consent and direction of the other, is recoverable in an action for money paid to the other's use. Accordingly, two persons having engaged in a stock-jobbing transaction, and incurred losses, one of them, who had repaid the broker employed the whole difference with the privity and consent of the other, was, notwithstanding the 7 Geo. II. allowed to recover a moiety from his co-partner in such transaction.

We have already seen, that the act of one partner binds the rest, their liability arising from their being considered as mutually present at and sanctioning the proceedings they singly enter into in the course of trade. And this responsibility of persons for the acts of each other in the course of trade cannot be limited by any

agreements, covenants, or provisoes, in the articles by which partnerships are constituted.

But though the act of one partner binds the others, yet if they can shew a disclaimer, they will be relieved from such responsibility. And it should seem, that, even during the subsistence of the partnership, and in the established course of trade, one partner may to a certain degree limit his responsibility. If there should be any particular speculation or bargain proposed which he disapproves of, by giving distinct notice to those with whom his co-partners are about to contract, that he will not in any manner be concerned in it, they could not have any claim upon him, as proof of this notice would rebut his *prima facie* liability.

But unless the debt relates to, and has been contracted in the course of the partnership concerns, no joint liability arises, but that partner only will be bound who contracts it.

The power of one partner to bind his co-partners in drawing bills of exchange, indorsing such as are payable to the firm, and making and indorsing promissory notes, has never been doubted, if such bills, &c. concern the joint trade.

But it is otherwise, if they concern the acceptor only in a disjoint interest. For if one of several partners draw, accept, or indorse a bill on behalf of himself and co-partners, it will not bind the others, if it concern him only in a distinct interest, and the holder of the bill, at the time he became so, was aware of that fact.

If the creditor of one of the several partners collude with him to take payment or security for his undivided debt out of the partnership funds, knowing at the time that it was without the consent of the other partners, it is fraudulent and void: but if taken *bond fide* without such knowledge at the time, no subsequently acquired knowledge of the misconduct of the partner in giving such security will prevent the holder from recovering against all the partners.

But the power of one partner to bind the firm by a negotiable instrument ceases with the existence of the partnership. And therefore, when the partnership is dissolved, a power to receive and pay all debts due to and from the partnership will not authorize one of the late partners to indorse a bill of exchange in the name of the partnership, though drawn by him in that name, and accepted by the debtor of the partnership after the dissolution.

And in *Abel v. Sutton* it was determined, that after a dissolution of a partnership one of the persons who composed the firm cannot put the partnership name to a negotiable security, so as to charge the others, even though it existed prior to the dissolution of the partnership, or were for the purpose of liquidating the partnership debts, notwithstanding such partner may have had authority to settle the partnership affairs. To render such security negotiable, all the partners must join.

A partner, as such, cannot bind his co-partner by deed. For the sealing or delivering by the party, or some one expressly authorized by him, are indispensably necessary.

But though one partner cannot bind his co-partner by deed, he

may, however, bar him of a right which they possess jointly. For when there is a promise to several jointly, or where there are several joint obligees or covenantees, a release by one binds all. However, in cases of gross collusion with creditors, relief would probably be granted in a court of equity.

But it will always be considered in what right a release is given by a joint obligee. If he release all actions in a representative capacity, a joint bond in his own right is not discharged.

But though partners are thus in general bound by contracts, they are not answerable for the wrongs of each other. If they all join in one trespass or *tort*, of course they all may be sued, and compelled to make compensation for the injury they have committed; but this action arises from their personal misconduct, and not from the relation of partnership which subsists between them. With regard to matters quite unconnected with partnership trade or business, there can be no question; and, in general, acts or omissions in the course of the partnership trade or business in violation of law will only implicate those who are guilty of them.

The rule, however, admits of exceptions. Partners, like individuals, are responsible for the negligence of their servants; and if one of the partners act, he is considered in this instance as the servant of the rest. In these cases, the *tort* is looked upon as the joint and several *tort* of all the partners; so that they may be proceeded against in a body, or one may be singled out, and sued alone for the whole of the damage.

By the death of one of several co-partners, the partnership is dissolved, unless there be an express agreement for the transmission of an interest in the business to the deceased partner's family, or for its continuation by his executors or administrators. For, in partnership, no benefit of survivorship obtains; the representatives of the deceased partner are tenants in common only with the surviving partner of the partnership effects in possession.

The modes by which a partnership contract may be dissolved are various. Bankruptcy, death, outlawry, and attainder for treason or felony, are *ipso facto* a dissolution of the contract.

When the partnership is formed for a single dealing or transaction, as soon as that is completed, the partnership is at an end of course. But where a general partnership is entered into for an unlimited time, it may be put an end to at any time by either of the parties, so that he acted *bonâ fide*. Therefore, if either of the partners should think proper to relinquish the partnership, he may do so, provided he do not break off with some sinister view, or do not quit after some particular business is begun, or at an unseasonable time, which might occasion loss and damage to the partnership.

A partnership may also be dissolved by the effluxion or expiration of the time for which it was originally constituted. It may be dissolved by the award of arbitrators. The gross misconduct

of a partner will induce a court of equity to disannul the contract. The insanity of one of the partners, if not of a temporary nature, will produce the same effect.

Where a partnership has been constituted for any definite time, if the business should be conducted after the expiration of that period without any new arrangement of the concern, it would probably be held, in analogy to the law of landlord and tenant, that the partnership continued under the condition and covenants contained in the original articles, with a power in either party to put an end to it at pleasure.

A partnership may be dissolved as between the partners themselves, and still subsist between them and the rest of the world. To free themselves from the responsibility, they must give reasonable notice, that they are no longer partners: and to such as may be considered to have had this notice they will be answerable only for their own acts and agreements. An advertisement in the *London Gazette* is the most usual and advisable method of giving notice of a dissolution of partnership to the public at large. For unless this, or something tantamount to it, be done, co-partners may continue liable to each other's creditors for any length of time after they have ceased to have dealings together. Nor is notice in the *Gazette* sufficient in itself, unless an actual knowledge of the dissolution of the partnership can be brought home to the creditor. Thus, when partners dissolve the partnership, they should, besides inserting an advertisement in the *Gazette*, send notice to all persons with whom they had dealings while in partnership.

When a partnership is dissolved, it frequently happens, that it is only to make some alteration in the firm, after which the partnership business goes on as before. In these cases, the partner coming in, or retiring, generally pays or receives a sum of money in proportion to his share in the concern. If the business is to be given up, or the partners cannot arrive at any amicable arrangement, then the partnership effects are all to be reduced into money, and the produce, together with the other funds of the house, rateably divided among the partners. But before there is any dividend, the partnership debts must be paid; and it is only to his share of the surplus that any partner is entitled. Upon this principle it has been held, that if a partner, when he retires, draw out of the partnership stock all that he had paid in, the house being insolvent at the time, he will be obliged to refund to the creditors of the other partners.

CHAPTER XVI.

Of Landlord and Tenant.

UNDER the head of landlord and tenant, the law of distresses would seem to require particular notice : but as this portion of the subject has been fully treated of in another part of the work, the reader is referred thither for any information he may require.

Of the Rent.

A demand of rent is indispensably necessary before a landlord can enter the premises for the non-payment of it, unless the necessity of such demand be waived by the express agreement of the tenant, and unless, by the 4 Geo. II. c. 28. § 2. where six months rent is in arrear, and there is not a sufficient distress on the premises ; for in all cases where an estate is upon condition to be void for non-payment of rent, the condition will not be broken if the rent be not demanded.

On a like principle, a demand is necessary where a penalty is reserved in case of non-payment.

But if a demand be dispensed with by the express terms of the lease, it is not necessary to make one previous to the entry ; the lessee having undertaken to pay the rent, whether it be demanded or not.

If a lessor or landlord wish to take advantage of a *re-entry* for non-payment of rent, the person demanding the same must be careful not to demand a penny more or less than what is due : he must also shew the certainty of the rent, and when due, or such demand is not good ; nor will a *re-entry* be given, unless the demand be precisely and distinctly followed.

But where the remedy is by *distress* (which is the legal and proper remedy of a landlord for recovery of rent in arrear, where no other is reserved in the lease), no previous demand is necessary in order to distrain, even though the lease expresses that the lessor may distrain for rent behind, being lawfully demanded ; because the distress itself is a demand, and the tenant is not divested of his estate by a distress, as he is by a *re-entry* ; for, on tender of the rent, the distress must be immediately withdrawn.

But when the rent is not payable on the land (as it is if no other place be mentioned), but at some other place appointed in the lease ; and the tenor of the lease is, that the landlord shall distrain for rent behind (being first lawfully demanded at the place mentioned in the lease), though the remedy be by distress, yet he cannot distrain in this case till demand.

Where the lessor omits to come and receive the rent on the day

appointed in the lease, and the lessee was on the land ready to pay it, and made a tender of it before witnesses; in this case he cannot afterwards distrain, without first demanding it.

Where a lease has a proviso, that in case of non-payment of the rent, the lessor or landlord may re-enter; if such lessor or landlord distrain, he loses his right of re-entry; though he may accept the rent of the lessee or tenant, and yet re-enter; but if he receive the succeeding quarter's rent, he cannot then re-enter; for the act of the lessor, or landlord, purges the lessee or tenant of his breach, and re-establishes his lease.

On a lease conditioning that the tenant shall do no waste, if he should commit waste, and the landlord afterward accept his rent, he waives his right of re-entry.

Where a lease is *ipso facto* void by the condition of limitation, no acceptance of rent afterwards can make it have continuance as between the grantor and grantee. But it is otherwise, if the deed be voidable only.

Rent is demandable and payable at any time before sun-set on the day upon which it is made payable, so that there be light enough for the landlord to count it by.

The landlord's receiving rent after the lease has become forfeited is no waiver, unless the forfeiture were known to him at the time.

A tender of rent is an offer to pay it at the time and place when and where it is made payable; and if it be refused, the refusal may be pleaded in bar of any action for non-payment.

But it is not enough for the person who intends to make a tender, to say, "I am ready to pay the debt, or to perform the duty:" for he must make an actual offer to pay the debt, or perform the duty.

A tender should be in the current coin of the kingdom; but it has been determined that a tender in bank notes is good, if not specially objected to on that account at the time.

If no particular place is mentioned in the lease where rent is to be paid, it must be tendered on the land, or in the house or room from which it issues, unless it be due to the king, when it must be paid either into his exchequer, or to his receiver in the country.

Where a tender is made to prevent a forfeiture, the whole rent due must be tendered (except land-tax), unless deductions are by lease allowed to be made.

By the 30 Geo. II. c. 2. § 15. tenants are required to pay such sums of money as shall be rated on the premises, and to deduct so much of the same out of their rents as the landlord ought to have paid, who is directed to allow the same upon the receipt of the rent, so that the land-tax receipts may now be tendered in part of payment.

A tender of rent at the proper time and place will save a distress or entry, or other condition in the lease, though the landlord refuse to take it, the tenant having done all that he was bound to do; the landlord, however, may still maintain an action

for debt or of covenant for his rent, but shall recover no damages for non-payment.

Rent tendered in a lump is a good tender, it being the receiver's business to count it out, and see that it is right.

Every quarter's rent is considered in law as a several debt from the lessee to the lessor, for which the lessor may distrain; except it be otherwise mentioned in the lease.

Acceptance is a taking in good part, and implies an agreement to some act done before, which might have been undone and avoided, if such an acceptance had not been made. Thus, although a lease may be made voidable by the *laches* or default of the lessee, in not paying his rent according to the covenants therein contained, yet it cannot only be rendered void by the act of the lessor, that is, by his entry; but if the lessor, after such non-payment at the day, and before re-entry, accept the rent, that which was before voidable becomes, by such acceptance, a good lease. So, also, if a lessor once accept rent from the assignee of the term, knowing of the assignment, he cannot afterwards bring an action of debt against the lessee for rent due after the assignment. The lessor, however, or his agent, may bring an action of covenant against the first lessee, on his covenant for payment of rent.

If a lessee covenants not to underlet without the consent of the lessor under hand and seal, with power of re-entry in case of breach, acceptance by the lessor of the rent due after the condition broken, with full notice, is a waiver of the forfeiture.

A landlord accepting the last quarter's rent when there are arrears on a former quarter, precludes himself from demanding the arrears.

If a landlord accept the rent after the lease is forfeited (with notice of the forfeiture), he will do away the forfeiture, and re-establish the lease; but otherwise without notice.

Acceptance of single rent is a waiver of double rent, given by the 4 Geo. II. c. 28.

If a tenant holding under two tenants in common pay the whole rent to one, after notice from the other not to pay it, the other tenant in common may distrain for his share.

One tenant in common levying a fine of the whole, and taking the rents and profits afterwards without account, for nearly five years, is no evidence from whence the jury should be directed (against the justice of the case) to find an ouster of his companion at the time of the fine levied; and, consequently, the latter may maintain ejectment, without making an actual entry.

If a landlord (of freehold premises) die between sunset and midnight, on the day on which the rent is reserved, such rent will belong to the executors or administrators of the lessor; but if before sunset, it will belong to his heirs, for it is payable any time before sunset, though not strictly due till midnight.

Though rent must be reserved, and is payable to the lessor and his heirs, yet this is to be understood only where the lessor has the

inheritance; for, in case of the death of the lessor, a distinction is to be taken where the lands demised are freehold, and where leasehold.

On the death of the lessor, who had the fee-simple of the premises demised, all rent becoming due subsequent to his death will be payable (as incident to the reversion) to his heirs at law; but if he had a term of years only in the premises, the rent would be payable to his executors and administrators, as part of his personal estate.

And with respect to leasehold interests, the rent reserved so certainly and indisputably belongs to the executors or administrators, and not to the heir, that though in the lease it be expressly reserved to the heirs of the lessor, yet shall the executors or administrators have it.

But though rent of fee-simple lands will, as incident to the reversion, go to the heir, the arrearages which became due in the lessor's life-time will belong to the executor; it being enacted by 32 Hen. VIII. c. 37. that the executors of tenants in fee-simple, fee-tail, or for term of life, to whom any rent shall be due, and not paid at the time of their death, shall have action of debt for such arrearages against the tenants who ought to have paid in the life-time of the testator, or against the executors or administrators of the said tenants.

If rent, by the terms of the lease, is payable on the four usual feast-days for payment of rent, or within twenty days thereafter, and the lessor die after the feast-day, but before the expiration of the twenty days, the rent is payable to the heir, and not to the executors of the lessor; because the legal and compulsory time for payment is not till the end of the twenty days.

If a lessor accept of rent from the assignee of his lessee, knowing of the assignment, he cannot afterwards distrain or have an action of debt against the lessee for rent, for the privity of contract is destroyed; but he may bring an action on the lessee's covenant, for no implication of law can do away an express and unconditional covenant.

If a lessor grant a term of years at a certain rent, and afterwards assign such rent, and the lessee agree to become tenant to the assignee, the rent becomes payable to such assignee; and he may distrain or bring an action of debt to recover it.

If a person having a lease of lands for any given term demise part of such term at a reserved rent, he may distrain for the reserved rent, or bring an action of debt for it, because the remainder vests in him.

An action of covenant lies against the assignees of the lessee of an estate for a part of the rent; and in case of eviction, the rent may be apportioned, as in debt or replevin.

The lessor, after a demise of certain premises with a portion of an adjoining yard, covenanted that the lessee should have the use of the pump in the yard jointly with himself, whilst the same should remain there, paying half the expences of repair. The

words "whilst, &c." reserve to the lessor a power of removing the pump at his pleasure: and it is no breach of the covenant, though he remove it without reasonable cause, and in order to injure the lessee.

If a lessor let lands on a lease, reserving rent, the lessee is liable to an action of debt for the rent, though he never entered on the demised premises. He is also liable to an action of covenant before he takes actual possession.

In the case of *Holford v. Hatch*, E. 10 Geo. III. if a lessee grant an under-lease of part of his term, the original lessor cannot sue the under-lessee in an action of covenant for rent due to him from the lessee to whom he demised the premises; but if the under-lease had been for the whole term demised, it would then be considered as an assignment, and not an under-lease, and the action would be maintainable.

A proviso, that a lease shall become void upon the lessee's committing an act of bankruptcy, and being found a bankrupt, is good.

In an ecclesiastical distribution of a testator's or intestate's estate, the executor or administrator must pay rent before bonds.

If a lessee covenant to pay rent, and to repair, with express exception of casualties by fire, he is liable upon the covenant for rent, though the premises are burnt down, and not rebuilt by the lessor after notice.

The 8 Ann. c. 14. enacts, that "No goods upon any tenement leased shall be taken by an execution, unless the party at whose suit the execution is sued out, shall, before the removal of such goods, pay to THE LANDLORD of the premises, or his *bailiff*, all money due for rent on the premises, provided the arrears do not amount to more than *one year's rent*; and if the arrears shall exceed one year's rent, then the party paying to the landlord or his bailiff one year's rent, may proceed to execute his judgment; and the sheriff is required to levy, and pay to the plaintiff, as well the money paid for rent as the execution money."

And it hath been determined, that an execution on judgment of nonsuit is an execution within this statute: and an action on the case will lie against the sheriff so taking the goods without leaving the year's rent. But the ground landlord of a house is not entitled to a year's rent on an execution against an under-lessee; and the landlord must demand the arrears before the goods are removed, or it will be too late.

And by 11 Geo. II. c. 15. it is enacted, that "Where any tenant for life shall die on or before the day on which any rent was reserved upon any demise which determined on the death of such tenant for life, the executors or administrators of such tenant for life may, in an action on the case, recover of the *under-tenants*, if such tenants for life die on the day in which the same was made payable, the whole; or if before such day, then a proportion of such rent, according to the time such

“tenant for life lived of the last year, or quarter, or other time
“in which the said rent was growing due, making all just
“allowances.”

On the nonpayment of rent the day it is due, the law has furnished landlords with several methods of recovering it, according to the circumstances of the respective cases, where no tender has been made, and demand has been ineffectual.

Rent in arrear may be recovered, 1st. By action at law; 2dly. By distress on the premises; 3dly. By ejectment.

By suit at law, it may be recovered either on the lessee's covenant for payment, or in action of debt.

By 32 Hen. VIII. c. 37. an executor or administrator of a tenant in fee-simple, fee-tail, or for life, shall have an action of debt for arrears of rent due in the life-time of the testator or intestate.

Formerly no action of debt could be maintained against a tenant for life for rent reserved; but now, by the 1 Ann. c. 14. and 5 Geo. III. c. 17. any person having rent in arrear upon any lease for life or lives, may bring an action for debt for such rent, as if it were due on a lease for years.

Also, by the 11 Geo. II. c. 19. where the demise is by parole or written agreement, and not by deed, the landlord may recover, in an action on the case, a reasonable satisfaction for the use and occupation of the premises so held and enjoyed.

Rent of premises let for certain improper purposes cannot be recovered by law; this was established in the case of *Wiggins v. George*, in the sittings after Easter Term 1824, before Chief Justice Abbott. It was an action to recover the rent of lodgings occupied by the defendant in the house of the plaintiff. The case being proved, the counsel for the defendant stated that he should shew the plaintiff was not entitled to recover for the lodgings, as they were let for the purposes of prostitution. The plaintiff's counsel admitted, that though if a person knowingly let rooms for vicious purposes he could not recover, yet if he received a lodger without knowing her intention, he was not to be deprived of his rent because she afterwards conducted herself in an improper manner. The lord chief justice said, the law had been correctly stated by the learned counsel for the plaintiff.

Of Warning, or Notice to quit.

Notice, or warning, is necessary only where the duration of the estate is fixed to no certain time, but depends on the pleasure of the parties, or some other uncertain event; as, tenant for the life of another, tenant from year to year, as long as the parties shall agree, &c.: for where it is held on lease for a certain time, the tenant may be ejected at the end of his lease without any previous notice to quit, as he cannot but be apprised of the expiration of his term, when the tenancy is determined as of course, unless a fresh agreement be entered into.

But, in order to charge a tenant with double rent, under the

4 Geo. III. c. 28. in case he should hold over after the end of the lease, reasonable notice must be given him to quit at the expiration of his term.

Where a tenant has done any act which amounts to a renunciation of his tenancy, as attorneying to a stranger, or controverting his landlord's title, he may be ejected without any previous notice (as may his executor, in case of his decease), because he has himself determined his estate.

But in all cases where the estate is determined at the will of either party, or at any other undetermined or uncertain period, the tenant cannot be ejected till half a year's notice has been given him to quit the premises; and such notice, in the case of a tenant from year to year, must generally expire at the same time of the year as that on which the tenancy commenced; as if a demise be from Midsummer to Midsummer, the notice to quit must be given at Christmas, so as to expire at Midsummer. It must be *half a year's* notice, for *six months* notice is not sufficient.

At a meeting of eleven of the judges (among whom were Lord Mansfield and Lord Chief Justice De Grey), a conference was had, on the motion of Mr. Justice Gould, what notice was necessary to be given to a lessee at will to quit possession, before a lessor at will could have the title to bring an ejectment, and recover possession; and it was their unanimous opinion, that in all cases of leases at will of farms of land to hold from year to year, and so for as long time as both parties shall please, that before the landlord can have title to bring ejectment against the tenant at will, he must give the tenant half a year's notice to quit possession of the farm. And they held the like law as to houses let at will, unless there be some usage or custom, in the place or district where the house is situate, to give a shorter or other kind of notice to quit.

Notice to quit at any of the four general feasts will be *prima facie* evidence of holding for that time, till the contrary be shewn.

Right *dem.* Fisher and another, v. Cuthell, M. 45 Geo. III. Where a lease for twenty-one years contains a proviso, that in case either landlord or tenant, or their respective heirs and executors, wished to determine at the end of the first fourteen years, and should give six months notice in writing under his or their respective hands, the term should cease; it was held that a notice to quit, signed by two only of three executors of the original lessor, to whom he had bequeathed the freehold as joint tenants, expressing the notice to be given on behalf of themselves and the third executor, was not good under the proviso, which required it to be given under the hands of all three. Neither could such notice be sustained under the general rule of law, that one joint tenant may bind his companion by an act done for his benefit; for *non constat* that the determination of the lease was for the benefit of the co-joint tenant, which it was incumbent on the party who wished to avail himself of it to prove. And the notice to quit being such as the tenant was to act upon at the time, no

subsequent recognition of the third executor would make it good by relation; nor was his joining in the ejectment evidence of his original assent to bind the tenant by the notice.

By the custom of London a tenant at will, under the yearly rent of forty shillings, shall have a quarter's warning; and paying above forty shillings, shall have half a year's warning.

By the 1 Geo. IV. c. 87. to facilitate the recovery of lands and tenements by landlords, it is enacted, that in any action of ejectment for the recovery of possession, it shall be lawful for the landlord, at the foot of the declaration, to address a notice to the tenant, or any one holding under him, requiring him to appear in the court in which the action shall have been commenced on the first day of the following term, there to be made defendant, and to find bail, if required by the court. And it shall be lawful for the landlord to move the court for a rule for such tenant or person to shew cause why such tenant or person, upon being admitted defendant, should not undertake, in case a verdict shall pass for the plaintiff, to give the plaintiff a judgment, to be entered up against the real defendant, of the term next preceding the time of trial, and also why he should not enter into recognizances to pay the costs of the action. And it shall be lawful for the court, if necessary, to make the rule absolute, either in the whole or in part; and to order such tenant or person to give such undertakings, and to find such bail as shall be specified in the rule, or such part of the same so made absolute; and, upon the party refusing or neglecting so to do, an absolute rule shall be made for entering up judgment for the plaintiff.

On trial of any ejectment, consent rule is to be evidence of lease, entry, and ouster; and if defendant make default, juries are to give damages for mesne profits down to the time of the verdict, or to a day specified therein; but the landlord is not barred from bringing an action of trespass for the mesne profits which shall accrue from the verdict down to the day of the delivery of possession of the premises. § 2.

On trial after undertakings given and bail found, the judge may stay the execution till the fifth day of the next term absolutely, on tenant's finding security not to commit any waste, or act in the nature of waste, or other wilful damage, and not to sell or carry off any standing crops, hay, straw, or manure produced or made (if any) upon the premises, and which may happen to be thereupon, from the day on which the verdict shall have been given to the day on which execution shall finally be made upon the judgment, or the same be set aside; but the recognizance shall immediately stand discharged and be of no effect, in case a writ of error shall be brought upon such judgment, and the plaintiff in such writ shall become bound with two sufficient sureties unto the defendant in the same, in such sum and with such condition as may be conformable to the provisions made for staying execution on bringing writs of error upon judgments in actions of ejectment. § 3.

By the sixth section, in all cases wherein the landlord shall

elect to proceed in ejectment, under the provisions hereinbefore contained, and the tenant shall have found bail, then if the landlord shall be nonsuited, or a verdict pass against him, there shall be judgment against him with double costs.

Nothing in the act shall prejudice any right of action which landlords already possess, in any of the cases herein-before provided for. § 7.

Of Holding over, and Double Rent.

By the 4 Geo. II. c. 28. if a tenant for life or years, or other person who shall come into possession by, from, or under him, shall wilfully hold the premises after the determination of the term, and after demand made, and notice in writing given for delivering the possession thereof, he shall, for the term of such detention, pay after the rate of double the yearly value thereof.

And by the 11 Geo. II. c. 19. § 18. if any tenant having power to determine his lease shall give notice of his intention to quit the premises at a time mentioned in such notice, and shall not accordingly deliver up the possession at the time in such notice contained, he, his executors or administrators, shall from thenceforward pay double rent for such time as he continues in possession.

The notice to quit under these statutes must be previous to the expiration of the lease.

A *parole notice* to quit, by a tenant on a *parole lease*, is good notice within the meaning of the statute.

A mortgagee need not give any notice to quit, if he mean only to get into the receipt of the rents and profits, even though the mortgage be subsequent to the lease; but in such case he will not be suffered to turn the tenant out of possession.

But where a tenancy from year to year commences previous to the premises being mortgaged, or to a grant of the reversion, the mortgagee or grantee must give the tenant *six months* notice to quit before the end of the year.

A conditional notice is sufficiently valid to found an ejectment upon; *to quit at the end of six months, or pay double rent*. So also a second notice to quit at the expiration of the lease, delivered to the tenant after the expiration of the first notice to quit on a subsequent day, or pay double rent, has been held to be no waiver of the first notice.

In the case of *Whiteacre dem. Boulton, v. Symonds*, T. 48 Geo. III. a landlord of premises about to sell them gave the tenant notice to quit on the 11th of October, 1806, but promised not to turn him out unless they were sold; and not being sold till Feb. 1807, the tenant refused on demand to deliver up possession. And on ejectment brought, held that the promise (which was performed) was no waiver of the notice, nor operated as a licence to be on the premises, otherwise than subject to the landlord's right of acting on such notice if necessary; and therefore that the tenant, not having delivered up possession on demand after sale, was a trespasser from the expiration of the notice to quit.

With respect to lodgings, an exception must be made to the rule laid down, that notice must expire on the quarter-day whereon the tenancy began. These depend either upon the express agreement between the parties, or the particular circumstances of the case, as the length of the time for which they are taken, &c. if for a less term than a year certain, any reasonable notice is sufficient.

What is reasonable notice, must, in case of dispute, be decided by a jury. In London, if no particular notice is mentioned, it is generally understood that a week's notice shall be given, if the apartments are taken by the week; and a month's notice, if taken by the month; but if taken for a week or a month, or any other time certain, no notice is expected or required, it being necessarily implied, that when the period for which they were taken arrives, the tenant is to depart, unless he enter into some fresh agreement.

Generally speaking, where notice is required by law to be given to any party, leaving it at his dwelling-house is sufficient.

If the lessor covenant to repair a house, but do not, the lessee may do it, and withhold as much of the rent as will pay himself.

Where a house is blown down by tempest, the law excuses the lessee, unless there is a covenant to repair and uphold.

Removing wainscot, floors, windows, and other things once fixed to the freehold of a house, is waste, and punishable accordingly.

The fixtures of vats, coppers, tables, partitions, &c. for the convenience of trade, if purchased or affixed by the lessee, may be removed by him; but it must be before the expiration of his term.

And in the case of *Penton v. Robart*, Mic. 42 Geo. III. To trespass for breaking and entering, &c. and pulling down and taking away certain buildings, &c. The defendant, as to the breaking and entering, suffered judgment by default, and pleaded not guilty as to the rest. Held, that such plea was sustained, by shewing that the building taken away, which was of wood, was erected by him as tenant of the premises, on a foundation of brick, for the purpose of carrying on his trade; and that he still continued in possession of the premises at the time when, &c. though the term was then expired.

Elwes v. Maw, M. 42 Geo. III. A tenant in agriculture, who erected at his own expence, and for the more necessary and convenient occupation of his farm, a beast-house, a carpenter's shop, fuel-house, cart-house, pump-house, and fold-yard wall, (which buildings were of brick and mortar, and tiled, and let into the ground) cannot remove the same, though during his term, and though he thereby left the premises in the same state as when he entered. There appears to be a distinction between annexations to the freehold of that nature for the purposes of trade, and those made for the purpose of agriculture and better enjoying the immediate profits of the land, in favour of the tenant's right to remove the former; that is, where the superincumbent building is erected as a mere accessory to a personal chattel, as an engine; but where it is accessory to the realty, it can in no case be removed.

The law allows a landlord to enter a house to view repairs; but

if he break the house, or continue there all night, he is a trespasser.

By the 8 Ann. c. 14. before the removal of goods taken in execution from the premises, the party at whose suit it is shall pay to the landlord all rent due upon the premises, provided it amount to no more than one year's rent.

But the sheriff is not obliged to wait and see if any one comes to demand the rent; he cannot take notice what arrears there are: but if the landlord come and acquaint him with it, then, and not till then, he is obliged to see the year's rent satisfied.

And, in case of two executions, there must not be two years' rent paid to the landlord; for the intent of this act was to reserve to the landlord only the rent for one year, and it was his fault if he let it run more in arrear.

In taking a house, it is necessary that a person should carefully examine the covenants in the original lease, and those in the under-lease, if any; or he may possibly discover, when too late, that he is tied down by such restrictions as to render the house unfit for his purpose, or likely to involve him in unforeseen difficulties.

He should take care to be convinced that the rent reserved in the original lease, as well as the ground-rent and all taxes, are paid up to the time he commences possession: for if they are not, he must pay all arrears, and can only recover them by having recourse to the last tenant.

Equal caution is necessary in taking unfurnished lodgings: for if the rent of the house be in arrear, either then, or at any subsequent period, the furniture of the lodger will be liable.

In purchasing a lease of a tenant, care should be taken (by examining the lease and inventory) that fixtures and other things belonging to the premises are not paid for together with those belonging to the tenant; for it is not unusual for a landlord to fit up his house with all necessary fixtures and conveniences, in which case they are included in the rent of the house, and not to be paid for separately. If, however, the fixtures have been put up by the tenant, he may remove and consequently sell them.

The laws of England do not make any distinction between lodgers and other tenants, as to the payment of their rents, or to the turning them out of possession; the landlords of both appear equally entitled to the same remedies for the recovery of their rents and premises, and the lodgers equally liable to the like penalties, forfeitures, and punishments, in case of nonpayment of their rents, or upon not quitting the premises according to notice and agreement, as other tenants are.

When apartments are let unfurnished by the landlord, and furnished by the lodger, a distress for the rent in all probability will recover the possession as well as the rent; but if it does not, the landlord, once having legal possession, may keep it; and if the lodger will not suffer him to do so quietly, he may then have recourse to the Welch ejectment, which is, to take out the windows, and untile the top of the premises, &c.

Of Covenants.

A *covenant* in a deed is an agreement, consent, or promise, that something is already done, or not done, or that something shall or shall not be done hereafter.

A *proviso* is a condition inserted in a deed or writing, upon the observance of which the validity of the deed depends. It differs from a covenant in this, that a proviso is in the words of and binding upon both parties; but a covenant, in the words of the covenantor only.

Covenants are either express or implied. *Express* covenants are such as are expressly mentioned in the deed; as a covenant that the lessee shall keep the demised premises in repair; *implied*, where the thing to be done or to be omitted is not expressly provided for in the deed, but inferred by law from the nature of the contract; as if a lease for years be made by the words *demise* or *grant*, the law implies a covenant on the part of the lessor, that he shall permit the lessee quietly to enjoy the thing demised.

In respect to express and implied covenants, it is material to observe, that an *implied* covenant is in all cases controuled within the limits of an *express* covenant.

By *clauses and agreements* in leases is generally understood such incidental parts of the contract between the parties as are not formally set forth in the shape of provisos or covenants: they differ, however, nothing from those in their effect, and are binding on one or all of the parties according to their import and tenor; and an action of covenant may be maintained upon them.

The express covenants usually inserted in leases are,

From the landlord—

- For quiet enjoyment of the premises by the lessee;
- To save him harmless from all persons claiming title;
- For further assurance.

From the tenant—

- To pay the rent and taxes (except land tax);
- To keep the premises in repair; and a variety of others.

It is not necessary, in order to constitute a good covenant, that the word "*covenant*," or that any other particular words should be used; as any thing under the hand and seal of the parties, which imports an agreement, will effectually amount to a covenant.

Thus the words "yielding and paying," usually inserted in leases, are held to be sufficient to support an action of covenant for nonpayment of rent.

Covenants are to be so construed as to correspond with the intention of the parties at the time of making them, and are therefore to be performed according to their spirit.

Thus, where a tenant covenanted that his landlord should have all the grains made in his brewery, and abided by his covenant, but put hops in the grains, so that cattle would not eat them, the covenant was held to be broken.

And so where a man covenanted to leave at the end of the term

all timber trees then growing thereon, and left them cut down, it was held to be a breach of the covenant.

But where a covenant is expressly entered into by a party, it will at law be strictly construed, and he will at all events be bound to perform it.

Thus, where a tenant covenants to pay rent during the term, he will be bound to continue the payment of it, though the premises should be destroyed by fire or other accident, and not be rebuilt by the lessor. So, even though the lessor himself prevents his enjoying the premises; because when a man charges himself by his own express contract, he is bound to abide by it, if practicable, notwithstanding the default of others.

And so if he covenant to repair, and the premises be consumed by lightning or the king's enemies, he is still liable.

But since the 6 Ann. c. 31. which enacts, that no action shall lie against any person in whose house any fire shall accidentally begin, (with a proviso, however, that the act shall not affect any agreement between landlord and tenant,) a tenant will not be liable, unless by special agreement.

Another rule in the construction of covenants is, that where there is any doubt as to the true construction of a covenant, it shall be taken most strongly against the covenantor.

The rules we have noticed, respecting the construction and extent of covenants, we shall exemplify in some of the principal cases which have been determined on those covenants which are most usually inserted in leases for years.

It has been held, that a covenant to pay rent on a certain quarter-day, or within so many days after, is held not to be broken till the expiration of the extra days.

Though a tenant covenants to pay the reserved rent without any deduction or abatement whatsoever, it has been determined, that the tenant may nevertheless deduct and retain the land tax out of his rent, if such tax is to be paid by the landlord.

As he may likewise ground rent, which he may have paid on a demand from the ground landlord, and also money expended in repair.

A covenant extends only to such things as are in being at the time of the agreement; therefore, where a tenant covenanted to pay all taxes, this binds him to the payment of such taxes only as were in being when the lease was made.

And where it is covenanted in a lease, that the tenant shall pay all taxes except land tax, it has been held, that this exception extends only to the tax payable at the time of the demise, and not to the additional land-tax, which may be occasioned by an improvement of the estate.

And in a case where a lessee for twenty-one years, having covenanted to repair and to pay all taxes and impositions, assigned his term for a small consideration, it was adjudged that he was not liable to pay the expences of a party-wall, either by the covenant, or by 14 Geo. II. c. 48. but that it must be borne by the original landlord.

But where premises have been let on a building lease, the owner of the improved rent, and not of the ground rent, shall pay the expences of a party-wall.

So the landlord of a house at rack-rent (no other person being entitled to any kind of rent) was held liable to contribute to the expences of a party-wall.

But if a tenant at rack-rent underlet his house at an advanced rent, he is liable to contribute to the expences of a party-wall; nor is the operation of the statute at all varied by any covenants to repair entered into between the landlord and tenant.

A tenant covenanted to pay a reasonable proportion of supporting, repairing, and amending all party-walls, &c. and to pay all taxes and impositions, parliamentary and parochial; it being the intent of the parties, that the landlord should receive a clear yearly rent of 60*l.* During the lease, the proprietor of the adjoining house built a party-wall. Held, that under the 14 Geo. III. c. 78. the tenant, and not the landlord, was bound to pay a moiety of the expence of the party-wall.

The usual words of a covenant for further assurance are, that the lessor should make such as counsel shall advise; in which case it has been determined, that he is not bound to attend to any requisition of the party himself. And this advice of counsel is to be given, not to the lessor, but to the lessee, who is to communicate it to the lessor; and the lessor is to have reasonable time allowed him to make such assurance, after notice given.

Covenants restraining a lessee from assigning his term were formerly thought to be unreasonable, and therefore not compulsive. But it has since been determined otherwise.

But a covenant, that a lessee shall not assign or set over the lease of the premises demised without licence, does not extend to an under-lease, that not being in any case considered as an assignment.

Nor where a lessee grants over his term, reserving the rent to himself, will it constitute an assignment, but only an under-lease, even though the whole term be parted with.

But if the words are, that he shall not set, let, or assign, the covenant will extend to an under-lease, which, though not an assignment is a letting of the premises.

An assignment by act of law, as by the lessee's becoming a bankrupt, is no breach of the covenant not to assign. And therefore, it is now frequent in leases to insert a clause for the landlord's re-entry in case of such an event.

Nor is the devise of a term by will a breach of a covenant not to assign.

And where licence is necessary in order to entitle the lessee to assign, the licence required must be strictly pursued; therefore, where the premises were not to be assigned without leave in writing, a parole licence was held to be insufficient.

But after licence to let or assign has been once obtained, the assignee is no longer bound by the covenant.

A covenant to repair and deliver up the demised premises at the

end of the term extends to erections made during the demise, as well as those in being at the time of the contract made.

And where the lessor covenants to repair, and neglects to do it, the lessee may repair, and deduct the expences out of the rent.

Where a tenant covenants to keep a house in repair, and leaves it in as good condition as he found it, he is not answerable for the natural and inevitable decay of the premises.

And though the tenant so covenants to keep in repair, and yet suffers them to go to decay, still no action will lie till the end of the term; because he may repair before his term expire.

Leases assigned by way of mortgage, in the county of Middlesex, should always be registered: for they are clearly out of the exemption of the Registry Act, (7 Ann. c. 20.) the possession and occupation there conjunctively mentioned being divided. And it is equally advisable to register all beneficial leases in Middlesex, assigned for a valuable consideration.

An action will lie against a tenant for not using the land in a husbandlike manner, even though there is no covenant to that effect.

In a covenant to use land in a husbandlike manner, the tenant is to use on the land all the manure made there; except that, when his time is out, he may carry away such corn and straw as he may not have used, and is not obliged to bring back the manure produced by it.

And in equity a tenant will be restrained from converting pasture into arable, though there were no express covenant against it, but only a covenant to manage in a husbandlike manner.

So from breaking up ancient meadow to build upon, contrary to express covenant.

A covenant in a lease for lives, to renew on the death of every life under the same rents and covenants, shall be taken to be a perpetual covenant of renewal.

Where lessor covenanted with the lessee to grant him a new lease on surrender of the old within a given period, and the lessor, before the period expired, aliened the land to another by fine, it was adjudged that the covenant was broken, for that the lessor had disabled himself to accept a surrender, and therefore could not make a new lease on request.

Where in a lease (containing several covenants for payment of rent, &c.) there was a covenant that the lessee might determine his lease at the end of three or five years of the term, on giving six months notice, and that after the expiration of such notice, and payment of rent, and performance of covenants, the lease should be void; it was held, that the payment of rent and performance of covenants was a condition preceding the determination of the term, and therefore that the notice alone, without such performance, would not enable the lessee to determine the lease.

Where a person having the reversion of a term for years accepts a release, by which the reversion is merged, the covenants incident to it will merge likewise.

When a covenant is merely negative and passive, some act must be done to constitute a breach; therefore where A covenanted to permit B to sow clover amongst barley to be sown by him (A), and A sowed in the last year without giving notice to B, it was held to be no breach.

But where the covenant is positive, or in the case of a covenant by operation of law (as where the tenant is under the word *demise*, which implies a covenant for a title), an action will lie without any act done by the lessor.

The performance of the agreements in a lease is sometimes secured by a penalty: as to which, this is to be observed, that a distinction is to be taken, where the penalty is in the nature of a punishment for a default, and where it makes a part of the agreement; in the first of which cases it is relievable against, and in the latter not. Thus, if there be a covenant not to plough up meadow land, under a penalty of 50*l.* per acre; here the penalty is by way of punishment, and may be relieved against in equity; but if the covenant be to pay 5*l.* per annum for every acre of meadow land ploughed up, this is a part of the agreement of the lease, and must be paid in case of breach.

Of Assignments.

In order to constitute an effectual assignment, the whole term of the assignor must be made over; for if a part only of it be transferred, it is not properly an assignment, but an under-lease; the difference of which is, that in an assignment the assignee stands in the shoes of the assignor, and is, generally speaking, answerable for all the covenants which he was bound to perform; whereas an under-lessee is tenant to his immediate lessor only, and has nothing to do with the terms of the original lease.

If the term made over be but a single day less than the whole term, it will not amount to an assignment.

An assignment must also be put into writing: this was not necessary at common law; but by the Statute of Frauds it is provided, that no leases, estates, or interest, &c. shall be assigned, granted, or surrendered, unless it be by deed, or note, in writing, signed by the party assigning, &c. or his agent, or by operation of law.

Under this clause it has been determined, that an assignment may be made by a mere memorandum in writing, signed by the party, without being sealed or delivered. But not without being stamped.

But no particular form of words is necessary to make it valid, if it do but clearly express the intention of the parties.

No consideration is required to be expressed in an assignment; for the assignee being subject to the payment of the rent reserved in the lease, is held to be a sufficient consideration.

If an assignment be defective as an assignment, it shall, against the party assigning, be good as an under-lease.

Arrears of rent, &c. being *choses* in action, are not assignable.

Executors and administrators are assignees in law, and are therefore liable to perform all such covenants of their testators or intestates, being lessees, as run with the land, though he covenanted for himself and assigns only, and not for his executors and administrators.

An assignee will be liable for the breach of all such covenants as, in the legal phrase, run with the land; but not for such as are collateral to it.

Those covenants are held to run with the land, which extend and relate to things in being at the time of the demise, and are a part of the grant, as covenants to repair, to pay rent, &c.: such covenants being, as it were, inherent to the land, will go along with it, and bind the assignee, though not named. But when a covenant relates to something not in being at the time of the demise, or merely personal, or to what is collateral to the thing demised, as to pay a sum of money in gross, or the like, it does not run with the land, and assignees are not bound, even though expressly named; but the covenantor only, his executors and administrators.

Thus, where a lessee for years covenants duly to pay his rent, to keep the premises demised to him in tenantable repair during his term, not to commit waste, &c. and then assigns; the assignees and all claiming under him shall be bound, because these things concern and are appropriated to the thing demised, and therefore run with the land.

But where lessee of premises covenanted for himself and his assigns to pay 40s. a year to the churchwardens of the parish for certain purposes, his assignee was not bound to pay it; it being a mere personal contract of the covenantor's, and independent of the thing demised.

The assignee of an assignee, as well of executors and administrators, as also the executors of an assignee, are all comprehended under the word "assigns," and therefore bound when those whom they represent are bound.

In an absolute indefeasible assignment, the assignee is liable even before he takes possession; the rent, &c. being due by the contract, and not by deed.

Covenants in a lease for payment of rent, and doing of repairs, entered into by a lessee with the mortgagor, his executors, administrators, and assigns, were held not to run with the land, so as to enable the assignee of the mortgage to maintain an action for the breach of them, though the mortgagor joined in the lease.

But where lessee covenanted that he, his executors, or administrators, would not assign, and becomes a bankrupt, it was held that the assignees under the commission would not be bound, provided they made a fair assignment.

A possibility, right of entry, or thing in action, or cause of suit

or title for condition broken, cannot be granted or assigned over by law; for if this were permitted, it would promote maintenance, and prove prejudicial to such as, being unable to contend with those with whom the original contract was made, might find themselves depressed by a powerful adversary.

The assignee of a term is bound to perform all the covenants annexed to the estate: as if A lease land to B, and B covenant to pay the rent, repair the houses, &c. during the said term, and B assigns to J. S. the assignee is bound to perform the covenants during the life of the first lessee, though the assignee be not named: because the covenant runs with the land, being made for the maintenance of a thing existing at the time of the lease made.

But if A lease for years to B, and B (for himself, his executors, and administrators) covenant with A to build a wall upon a part of the land demised, and after B assigns, the assignee is not bound by this covenant; for the law will not annex the covenant to a thing not in existence.

Yet if B had covenanted for him and his assigns to build the wall, &c. this would have bound the assignee, because it was to be done upon the land, and the assignee was to have the benefit thereof.

A lease was made to one person, who assigned to another; the lessor received the rent of the assignee, which became due in his time, but had no particular notice given him of the assignment. It was adjudged in this case, that no special notice need be given by the lessee of the assignment, but that the acceptance of the rent of the assignee was a sufficient notice, and he could not resort to the first lessee for his rent afterwards.

Winter v. Brockwell, E. 47 Geo. III. A parole licence to put a sky-light over the defendant's area (which impeded the light and air from coming to the plaintiff's dwelling-house through a window) cannot be recalled at pleasure, after it has been executed at the defendant's expence, at least without tendering the expences he had been put to; and therefore no action lies as for a private nuisance, in stopping the light and air, &c. and communicating a stench from the defendant's premises to the plaintiff's house, by means of such sky-light.

CHAPTER XVII.

Of Carriers.

ALL persons carrying goods for hire, as masters and owners of ships, lightermen, proprietors of waggons, stage-coachmen (but not hackney-coachmen in London, except there is an express agreement, and money paid for the carriage of the goods), and the like, come under the denomination of common carriers, and are bound on the general custom of the realm, that is, by the common law, to receive and carry the goods of the subject for a reasonable hire or reward, to take due care of them on their passage, to deliver them safely and in the same condition as when they were received, or, in default thereof, to make compensation; unless the loss or damage arise from the act of God, as storms, tempests, and the like; or of the king's enemies; or from the default of the party sending them.

And where a person undertakes to carry goods safely and securely, he will be responsible for the damage they sustain in the carriage through his neglect, though he is not a common carrier, nor takes any premium for the carriage; and this rule holds, although the plaintiff for greater caution, sends his servant with the goods, who pays a person for guarding them, because he apprehends danger of their being stolen.

Where a carrier entrusted with goods opens the pack, and takes away part of the goods, he is guilty of felony. And it is the same, if the carrier receive goods to carry to a certain place, and carries them to some other place than that appointed, with an intent to defraud the owner. So if a carrier, after he has brought goods to the place appointed, takes them away privately, he is guilty of felony; for the possession which he received from the owner being determined, his second taking is in all respects as if he was a mere stranger.

If a common carrier, who is offered his hire, and who has convenience, refuse to carry goods, he is liable to an action in the same manner as an innkeeper who refuses to entertain his guest, or a smith who refuses to shoe a horse.

But a carrier may refuse to admit goods into his warehouse at an unseasonable time, or before he is ready to take his journey.

Though a carrier uses all proper care, yet in case of a loss he is liable; for negligence does not enter into the ground of this action. And therefore it is no defence, that the ship was tight when the goods were placed on board, but that a rat by gnawing out the oakum had made a hole, through which the water gushed; or that the loss of the goods was occasioned by the vessel's

striking against the anchor of another vessel, which had a buoy to mark where the anchor lay.

A carrier is also responsible for a loss occasioned by accidental fire, provided such loss happens while the goods are in his custody.

Thus, if goods entrusted to a common carrier be consumed by an accidental fire communicating to a booth in which the goods had been deposited by the carrier in the course of his journey, he is held to be liable.

So, where common carriers from A to B charged and received for cartage of goods from a warehouse at B (where they usually unloaded, but which did not belong to them) to the house of the consignee in B, it was held, that they were responsible for a loss by an accidental fire while the goods were in the warehouse; although they allowed the profits of cartage to another person, and that circumstance was known to the consignee.

But where the goods are not remaining in the carrier's custody, he is not liable; as where the goods had been carried by the defendant from A to B, and there deposited in a warehouse, merely for the convenience of the owner, until they could be forwarded by another conveyance (the owner not paying the defendant any thing for the warehouse-room), and they were consumed by an accidental fire there, it was held that the defendant was not liable.

If a carrier be robbed of his goods, he shall be liable for the loss; for, having his fare, there is an implied undertaking for the safe custody and delivery of the goods. But the carrier may bring an action on the statute of Winchester against the hundred, to make good his loss.

In every contract for the carriage of goods, between a person holding himself forth as the owner of a lighter or vessel ready to carry goods for hire, and the person putting goods on board, or employing his vessel or lighter for that purpose, it is a term of the contract on the part of the carrier or lighterman, implied by law, that his vessel is tight and fit for the purpose or employment for which he offers and holds it forth to the public. And the carrier or lighterman will be responsible for a breach of this implied undertaking, although he should give notice, "that he will not be answerable for any loss or damage, unless occasioned by want of ordinary care in the captain or crew of the vessel, in which case he will pay ten pounds per cent. on such loss or damage, so as the whole does not exceed the value of the vessel and freight." In *Ellis v. Turner*, where a similar notice was given, the owner of the vessel was held liable for the whole loss, upon the special undertaking of the master.

But by the 7 Geo. II. c. 15. it is provided, that if any loss arises by the embezzlement or dishonesty of the master, or any of the mariners in the ship, the owner shall only be liable to the amount of the value of the ship and freight.

And on this statute the defendant was held not to be liable to

make good a theft committed on board the vessel during the night and by force, by a number of fresh-water pirates, beyond the value of the vessel and freight.

The 26 Geo. III. c. 86. still further provides, that the ship-owners shall not be liable for a loss occasioned by robbery or embezzlement committed by any person whatever, without their privity, beyond the value of the ship and the vessel. And it further exempts them from all liability to answer for a loss occasioned by fire, and also in the case of robbery of gold, silver, watches, and precious stones, unless the proprietor declares to the master or ship-owners, in writing, the nature and value of such articles.

Upon the ground that a carrier is not liable for an accident occasioned by the act of God, it has been held that if a bargeman in a tempest, for the safety of the lives of the passengers, throw overboard any trunks or packages, he is not liable.

By the custom of the realm, a common carrier is bound to carry the goods of the subject for a reasonable reward, to be therefore paid, by force of which he has a lien as far as the carriage price of the particular goods, but not to any greater extent. A lien claimed by a carrier for a general balance, not being founded on the common law, but arising by contract between the owner of the goods and the carrier, must be supported by the general, uniform, and long established usage of trade: for as general liens are not favoured in law, evidence of a few recent instances of detainer by carriers for their general balance will not be sufficient to furnish an inference that the party who dealt with the carrier had knowledge of the usage, and so to warrant a conclusion, that he contracted with reference to it, and adopted the general lien into the particular contract.

A common carrier having a special property in the goods entrusted to him, and being liable to make satisfaction for them to the owner, may have action of trover or trespass, if they are taken out of his possession by a stranger. And where goods are stolen from a carrier, he may bring an indictment against the felon as for his own goods, though he has only the possessory, and not the absolute property; and the owner may likewise prefer an indictment against the felon.

The action against a carrier for the non-delivery or loss of goods must be brought by the person in whom the legal right of property in the goods in question is vested at the time; for he is the person who has sustained the loss, if any, by the negligence of the carrier. Hence, where a tradesman orders goods to be sent by a carrier, at the moment the goods are delivered to the carrier, it operates as a delivery to the purchaser; and the whole property (subject only to the right of stoppage *in transitu* by the seller) rests in the purchaser; he alone can maintain an action against the carrier for any loss or damage to the goods; and this rule holds as well where the particular carrier is not mentioned by the purchaser as where he is; and it holds as well in the case of a carrier by water as where the goods are conveyed by land.

But if there be a special agreement by the parties, that the consignor was to pay for the carriage of the goods, the action is maintainable by the consignor.

In order to charge the carrier, these circumstances are to be observed :—

1. The goods must be lost while in possession of the carrier himself, or in his sole care. Therefore where the plaintiffs, the East-India Company, sent their servant with the goods in question on board the vessel, who took charge of them, and they were lost, the defendant was held not to be liable.

2. The carrier is liable only so far as he is paid, for he is chargeable by reason of his reward.

A person delivered to a carrier's book-keeper two bags of money, sealed up, to be carried from London to Exeter, and told him that it was 200*l.* and took his receipt for the same, with promise of delivery for ten shillings per cent. carriage and risk ; if the carrier be robbed, though the bags contained 400*l.* he shall be answerable for 200*l.* only.

So where 100*l.* was delivered in a bag to a carrier's book-keeper by the plaintiff's servant, and paid for as a common parcel, when lost, the carrier was held not to be liable ; it being proved that he had, by public advertisement, limited his responsibility as to any money, plate, jewels, writings, or other valuable goods, unless they were entered as such, and paid for accordingly.

3. Under a special or qualified acceptance, the carrier is bound no farther than he undertakes. For where the owner of a stage-coach puts out an advertisement, " that he will not be answerable for money, plate, jewels, watches, writings, goods, or any package whatever, (if lost or damaged), above the value of 5*l.* unless insured and paid for at the time of the delivery," all goods received by him are under that special licence ; and if they are lost, the proprietor of the stage-coach is not answerable, not even to the extent of the 5*l.* or the sum paid for booking. But, in order to defend himself in an action, the carrier must prove that such notice was stuck up in a conspicuous part of the office where the owner brought his goods, or that it was advertised in a newspaper which he was accustomed to read ; and Lord Ellenborough has expressed strongly his disapprobation of the great alterations which have been made in the common-law obligation ; and has declared that in every case where a carrier sets up a special engagement as his defence, he would require proof of actual notice to the owner of the article.

4. The delivery to a carrier's servant is a delivery to himself, and shall charge him ; but they must be goods such as it is his custom to carry, not out of his line of business.

Coach-owners are not liable for injuries which passengers may sustain from inevitable accidents, as from the overturning of the coach from the horses taking fright, there not being any negligence in the driver ; but it is otherwise, if there should have been negligence in the driver.

CHAPTER XVIII.

Of Innkeepers.

AT common law, any man might erect and keep an inn or alehouse for the reception of travellers, without any licence or allowance for such erection; but now a licence is necessary by several acts of the legislature, for the particulars of which we refer the reader to the Excise Laws in the Supplement to this Work, where he will find every requisite information under the head of *Licences*.

If the keeper of an inn harbour thieves, or persons of scandalous reputation, or suffer frequent disorders in his house, or take exorbitant prices, or set up a new inn in a place where there is no manner of need of one, to the hindrance of other ancient or well-governed inns, or keep it in a situation wholly unfit for that purpose, he may by the common law be indicted and fined.

By the 21 Jac. I. c. 21. § 1. innholders shall sell their horsebread (which, unless there is none in the same town, they are prohibited from making), hay, oats, beans, pease, provender, and all kinds of victuals both for man and beast, for reasonable gain, having respect to the prices for which they shall be sold in the markets adjoining, without taking any thing for litter.

By the commission of the peace, two justices, one of whom must be of the quorum, may inquire of innholders, and of all and singular other persons, who shall offend in the abuse of weights and measures, or in the sale of victuals, against the form of the ordinances in that behalf.

By the 25 Geo. III. c. 113. so much of 5 Geo. III. c. 46. as relates to the penalties for selling ale without licence is repealed, and other penalties are inflicted in lieu thereof, as follow. After the 20th of Sept. 1795, every person who shall sell or permit to be sold in his house, out-house, &c. or other place, ale or beer, or any other exciseable liquors, by retail, without being duly licensed, shall forfeit 20*l.* with costs; and for a second offence, such person shall moreover be rendered incapable of being afterwards licensed to keep an alehouse, or to sell ale, beer, or other exciseable liquors by retail. § 1.

But no person shall be liable to the said penalty for selling beer or ale in casks containing not less than five gallons, or in bottles not less than two dozen quarts, not to be drunk in his house, out-house, garden, yard, orchard, or other place. 38 Geo. III. c. 54. § 13.

And every alehouse-keeper, victualler, or retailer of beer or ale, who shall have in his custody or power any beer or ale to sell by retail, shall, three days at least before he begins to sell or dispose thereof, make entry, in writing, at the next excise office, of every house, out-house, cellar, vault, room, store-house, or other place, to be used for keeping or selling the same, on pain of forfeiting 50*l.*

And if any person shall be disabled, by conviction, to sell ale, beer, cyder, or perry, he shall, by the same conviction, be disabled to sell any spirituous liquors, any licence before obtained notwithstanding; and every licence granted to him for selling ale, beer, cyder, perry, or spirituous liquors, shall be void; and if he shall sell during such disability, he shall be punished as for selling without licence. 20 Geo. II. c. 31. § 11.

By the 11 & 12 W. c. 15. which is required to be given in charge at the sessions to the grand jury, it is enacted, that all innkeepers, alehouse keepers, suttlers, victuallers, and other retailers of ale or beer, and every person keeping a public house, and retailing or selling ale or beer, shall retail and sell the same in and from their houses by a full ale quart or ale pint, according to the standard of the exchequer, in a vessel made of wood, earth, glass, horn, leather, pewter, or some other good and wholesome metal, made and sized to the standard, either from the exchequer, or from a city, town corporate, borough, or market-town, where a standard ale quart or pint made from the same standard shall be kept for that purpose; and shall not retail or utter any ale or beer in any other vessel not signed and marked, on pain of forfeiting not above 40s. nor under 10s. for every offence, half to the poor, and half to him that shall prosecute or sue for the same; to be recovered before one justice, by the oath of one witness, and to be levied by warrant of distress, rendering the overplus, the reasonable charges being first deducted thereout. The prosecution to be within thirty days.

Innkeepers are bound by law to receive guests who come to their inns, and are also bound to protect the property of those guests. They have no option either to receive or reject guests; and as they cannot refuse to receive guests, so neither can they impose unreasonable terms on them.

And inns being intended for the lodging and reception of travellers, may be suppressed, and the innkeepers indicted and fined, if they refuse to entertain a traveller without a very sufficient cause.

If, therefore, one who keeps a common inn refuse either to receive a traveller, as a guest into his house, or to find him victuals or lodging, upon his tendering him a reasonable price for the same, he is not only liable to render damages for the injury, in an action on the case at the suit of the party grieved, but also may be indicted and fined at the suit of the king.

Also, it is said, that he may be compelled by the constable of the town, or by a justice of the peace, to receive and entertain such a person as his guest; and that it is no way material whether he has a sign before his door or not, if he make it his common business to entertain passengers.

He may also be compelled to receive a horse, although the owner do not lodge in his house.

By the 1 Jac. c. 9. if any innkeeper, victualler, or alehouse keeper, or tavern-keeper, keeping an inn or victualling house, shall suffer any person inhabiting any city, town corporate, market

town, village, or hamlet, where such inn, tippling-house, or alehouse shall be, (and by the 1 Car. c. 4. where he shall inhabit), to continue drinking or tippling therein, (except such as shall be invited by any victualler, and shall accompany him only during his necessary abode there; and except labouring and handicraftsmen in cities, towns corporate, and market-towns, upon the usual working days, for one hour at dinner-time, to take their diet in an alehouse; and except labourers and workmen, which, for the following of their work, by the day or by the great, in any city, town corporate, market-town, or village, shall, for the time of their said continuing to work there, sojourn or lodge, or victual in any inn, alehouse, or other victualling-house; and except for urgent and necessary occasions, to be allowed by two justices), he shall, on conviction thereof before the mayor, or a justice of the peace, on view or confession, or oath of one witness, forfeit 10s. to the poor. 1 Jac. c. 9. § 2; 1 Car. c. 4; 21 Jac. c. 7.

And moreover, if any alehouse-keeper shall suffer any person inhabiting in any city, town corporate, market-town, village, or hamlet, where such inn, tippling-house, or alehouse shall be, to continue drinking or tippling therein as aforesaid, he shall be disabled for the space of three years to keep such alehouse.— 21 Jac. c. 7. § 5.

And if any person licensed to sell any sort of liquors, or who shall sell or suffer the same to be sold in his house, out-house, ground, or apartments thereto belonging, shall knowingly suffer any gaming with cards, dice, draughts, shuffle boards, mississippi or billiard tables, skittles, nine-pins, or with any other implement of gaming, in his house, out-house, ground, or apartment thereunto belonging, by any journeyman, labourer, servant, or apprentice, and shall be convicted thereof, on confession, or oath of one witness, before one justice, within six days after the offence committed, he shall forfeit for the first offence 40s. and for every other offence 10l. by distress, by warrant of such justice; three-fourths of which shall go to the churchwardens for the use of the poor, and one-fourth to the informer. § 14.

And if any journeyman, labourer, apprentice, or servant, shall game in any house, out-house, ground, or apartment thereto belonging, wherein any liquors shall be sold, and complaint thereof shall be made on oath before one justice, where the offence shall be committed, he shall issue his warrant to the constable or other peace officer of the place wherein the offence is charged to have been committed, or where the offender shall reside, to apprehend and carry the offender before some justice of the place where the offender shall be committed, or where the offender shall reside; and if such person shall be convicted thereof by the oath of one witness, or on confession, he shall forfeit not exceeding 20s. nor less than 5s. as the justice shall order, every time he shall so offend and be convicted as aforesaid; one-fourth to the informer, and three-fourths to the overseers for the use of the poor; and if he shall not forthwith pay down the same, such justice shall commit him to the house of correction, or some other prison of the

place where he shall be apprehended, to be kept to hard labour for any time not exceeding one month, or until he shall pay the forfeiture. § 15.

If any person (unless those excepted by 1 Jac. c. 9.) shall continue drinking or tippling in any inn, victualling-house, or alehouse, he shall, on conviction thereof before a mayor or a justice of the peace, on view, confession, or oath of one witness, forfeit for every offence 3s. 4d. to be paid within one week next after the conviction to the churchwardens, who shall be accountable for the same to the use of the poor; and if he shall refuse or neglect to pay the same, it shall be levied by distress; and if he is not able to pay the forfeiture, then the mayor, justice, or court, where the conviction shall be, may punish the offender by setting him in the stocks for every offence for the space of four hours. 1 Jac. c. 9; 4 Jac. c. 5. § 4; 21 Jac. c. 7. § 2; 1 Car. c. 4.

If any alehouse-keeper shall be convicted of the above offence, he shall, moreover, for the space of three years, be disabled to keep any such alehouse. 7 Jac. c. 10; 21 Jac. c. 7. § 4.

An inn-keeper may detain the person of his guest who eats, or the horse which eats, till payment. And this he may do without any agreement for that purpose. Therefore, in trover for a horse in an innkeeper's hands, denial is no evidence of conversion, unless the plaintiff tender what the horse has eaten out.

But a horse committed to an innkeeper may be detained only for his own meat, and not for the meat of his guest.

By the 11 & 12 W. III. c. 15. § 2. if any innkeeper, alehouse-keeper, victualler, or sutler, in giving any account or reckoning in writing, or otherwise, shall refuse or deny to give in the particular number of quarts or pints, or shall sell in measures undermarked, it shall not be lawful for him, on default of payment of such reckoning, to detain any goods or other things belonging to such person or persons from whom such reckoning shall be due; but he shall be left to his action at law, any custom or usage to the contrary notwithstanding.

In the like manner, if the innkeeper give credit to the person for that time, and let him go without payment, then he has waived the benefit of the custom, and must rely on his other agreement; for no person can in any case retain where there is a special agreement, because then the other party is personally liable.

An innkeeper may detain for his keep a horse left with him to be kept, though the persons who left him had no right to him, and though such persons did not stay in the inn.

And if a man commit his horse to an innkeeper, and he put him to pasture, he may detain the horse until he is satisfied for the meat; for the pasture has the same privilege as the stables.

If a horse committed to an innkeeper be detained by him for his meat, and the owner take him away, the innkeeper must make fresh pursuit after him, and retake him, otherwise the custody of

him is lost, for he cannot retake him at any other time; for if a distress is rescued, and the party on fresh pursuit does not retake it, the distress is lost.

But if a horse be committed to a hostler, who detains him for his meat, and afterwards the owner agree that he shall detain him till he shall be satisfied, here he has not only the custody of him as a distress, but also the property in him as a pledge; and if the owner take it from him, he may not only retake it upon fresh pursuit, but wherever he meets it, because he had a property by such agreement.

An innkeeper who detains a horse for his meat cannot use him, because he detains him as in custody of the law.

But by the custom of London and Exeter, if a man commit a horse to an innkeeper, and he eat out his price, the innkeeper may take him as his own.

An innkeeper has no power to sell the horse by general custom, though he may by special custom, as in the city of London.

Inns being allowed for the benefit of travellers, the innkeeper shall answer for those things which are stolen within the inn, though not delivered to him to keep.

So if he put a horse to pasture without the direction of his guest, and the horse be stolen, he must make satisfaction.

And though an innkeeper bid his guest take the key of his chamber and lock the door, and tell him that he will not take the charge of the goods, yet if they be stolen, he will be answerable, because he is charged by law for all things that come to his inn, and he cannot discharge himself by any such or the like words.

It has long been established law, that the innkeeper is bound to restitution, if the guest is robbed in his house by any person whatever, unless it appear that he was robbed by his own servant, or by a companion whom he brought with him; and it is no plea for the innkeeper, that at the time his guest's goods were lost he was sick and insane. But if the guest be not a traveller, but one of the same town, the master of the inn is not chargeable for his servant's theft; and if a man be robbed in a private tavern, the master is not chargeable.

So where the plaintiff's servant came to the inn, and desired to have the liberty of leaving his goods, which he could not dispose of in the market, until the next week, which proposal was rejected; whereupon he sat down in the inn as a guest, with the goods behind him, and during the time the goods were taken away; it was held, that although his request was not complied with, he was entitled to protection for his goods during the time he continued in the inn as a guest.

It is clear that the goods need not be in the special keeping of the innkeeper in order to make him liable; if they be at the inn, that is sufficient to charge him.

But an innkeeper is bound to answer for those things only that are *infra hospitium*. If therefore he refuse, because his house is full, to receive a person, who thereupon says he will shift, and then is robbed, the innkeeper is not liable.

Holt, C. J. doubted whether a man was a guest by setting up his horse at an inn, though he never went into the inn himself: but the other three judges held, that such person is a guest by leaving his horse, as much as if he had staid himself; because the horse must be fed, by which the innkeeper has gain: but otherwise, if he had left a trunk, or a dead thing.

But if a man come to an inn with a hamper, in which he has certain goods, and depart, leaving it with the host, and two days after come again; and in the time of his absence it was stolen, he shall not have any action against his host, because he was not a guest at the time of the stealing, and the host had no benefit by the keeping thereof, and therefore was held not to be liable for the loss thereof in his absence.

If one come to an inn, and make a previous contract for lodging for a set time, and do not eat or drink there, he is no guest, but a lodger, and so not under the innkeeper's protection; but if he eat, drink, or pay for his diet, it is otherwise.

By the Mutiny Act, which is renewed annually, all keepers of inns, livery-stables, alehouses, victualling-houses, and the houses of sellers of wine by retail, to be drunk in their own houses, or places thereunto belonging, (other than person's canteens, held under the authority of the commissioners for the affairs of barracks; and other than persons who keep taverns only, being free of the Vintners' Company in London) and all persons selling brandy, strong waters, cyder, or metheglin, by retail, to be drunk in houses (other than the houses of distillers, who keep places for distilling brandy and strong waters, and of shopkeepers, whose principal dealing shall be more in other goods than in brandy and strong waters, and who do not permit tippling in their houses), are obliged to receive all officers and soldiers quartered or billeted upon them. But if a person shall be aggrieved by having more soldiers billeted than in proportion to his neighbours, on complaint thereof to one justice of the division, &c. where quartered, or if the person so billeting them be a justice, then, on complaint to two justices, he may be relieved.

And if any victualler, &c. having any officer, &c. billeted upon him, refuse to receive him, or refuse to furnish him as herein provided by the act, and shall be thereof convicted by one justice of the county, &c. where such offence was committed, on confession, or the oath of one witness, he shall forfeit not more than 5*l.* nor less than 40*s.* to be levied by distress; which sum shall be applied, first, to satisfy such soldier for the expence thereby occasioned to him, and the remainder to the overseer of the parish where the offence was committed.

By the same act, if any officer, military or civil, shall quarter any of the wives, children, or servants of any officer or soldier in any house, against the consent of the owner, he shall forfeit 20*s.* to the party aggrieved, on proof thereof to the next justice of the peace.

Officers and soldiers billeted as aforesaid shall be received and furnished with diet and small beer, paying for the same out of their subsistence money.

If any person shall choose rather to furnish non-commissioned officers or private men with candles, vinegar, and salt *gratis*, and allow them the use of fire, and the necessary utensils for dressing and eating their meat, and shall give notice thereof to the commanding officer, and shall furnish them accordingly; in such case they shall provide their own victuals and small beer, and the officer who receives their pay shall pay the sum out of the subsistence money for diet and small beer to them, and not to the persons on whom they are quartered.

Every officer receiving the pay or subsistence money, either for a regiment, or for particular troops and companies, or otherwise, shall, immediately upon the receipt of such sum, give public notice thereof to all on whom officers and soldiers are quartered; and shall also appoint such persons to repair to their quarters, at such times as they shall appoint for the payment of the said pay or subsistence money to the officers or soldiers, which shall be within four days at the farthest after the receipt of the same as aforesaid; and such person shall then and there acquaint such officer with the accounts or debts between them and the officers and soldiers quartered; which accounts the said officer is to accept of, and immediately pay the same, before any part of the pay or subsistence be distributed. And if such officer shall not so give notice, and shall not, immediately upon producing such account stated, satisfy the same; upon complaint on oath by two witnesses, at the next quarter sessions for the county or city where such quarters were, the paymasters of the guards, garrisons, and marines, are authorized, upon certificate of the said justices, before whom such oath was made, of the sum due upon such accounts, and the persons to whom the same is owing, to pay the said sums out of the arrears due to the said officer, upon pain of such paymaster forfeiting his place, and being incapacitated from holding it again.

The commanding officer may exchange any men or horses quartered in any place with another man or horse quartered in the same place, provided the number of the men and horses do not exceed the number at that time billeted on such house.

Where any horse or dragoon shall be quartered upon any person who has no stable; upon his complaint to two justices of the division, and his making such allowance as such justices shall think reasonable, they may order the men and their horses, or their horses only, as the case may be, to be removed and quartered upon some other person who has stables; and may order and settle a proper allowance to be made by the person having no stables, in lieu of his quartering such horse or dragoon, and order payment thereof to the person to whom the removal is made, for or to be applied for the furnishing of quarters for such men and their horses.

By the 5 Geo. IV. c. 31. § 1. every non-commissioned officer and private soldier, who shall be furnished with diet and small beer by innholders, shall pay the sum of one shilling *per diem*: and for such allowance, the innholder shall furnish one meal, *videlicet*, a hot dinner (if required) in each day, to consist of such

quantities of diet and small beer as have been or shall be specified and fixed by any regulations by his majesty in that behalf, but not to exceed one pound and a quarter of meat previous to being dressed, one pound of bread, one pound of potatoes or other vegetables previous to being cooked, and two pints of small beer, and vinegar, salt, and pepper.

And it is further enacted, that in case any innholders or other persons on whom any non-commissioned officers or private men shall be quartered, shall, by virtue of the option in the act of the 5 Geo. IV. c. 13. (the annual Mutiny Act) furnish the articles therein mentioned, in lieu of furnishing diet and small beer at the rates prescribed by this act, such innholders shall receive in consideration thereof one half-penny *per diem* for each non-commissioned officer and soldier. § 2.

For horses quartered ten-pence per day is to be paid for hay and straw. § 3.

And all non-commissioned officers and soldiers shall be entitled to receive their diet and small beer from the innholders or other persons on whom they may be billeted, at the rates hereinbefore prescribed, while on the march, as also for the day of their arrival at the place of their final destination, and on the two subsequent days, unless either of the two subsequent days shall be a market-day in and for the town or place where such officers or soldiers shall be billeted, or within the distance of two miles thereof; in which case it shall be lawful for the innholder or other person as aforesaid to discontinue on and from such market-day the supply of diet and small beer, and to furnish in lieu thereof the articles in the said act of the 5 Geo. IV. c. 13. and at the rates hereinbefore prescribed. And if any victualler or other person liable to have soldiers billeted or quartered on him or her shall pay any sum or sums of money to any non-commissioned officer or soldier on the march, in lieu of furnishing in kind the diet and small beer to which such non-commissioned officer or soldier is entitled, every such victualler or other person may be proceeded against and fined in like manner as if he or she had refused to furnish or allow, according to the directions of the said act, the several things respectively directed to be furnished to non-commissioned officers or soldiers so quartered or billeted on him or her as aforesaid. § 4, 5.

If any regiment, troop, company, or detachment, when on the march, shall be halted, either for a limited or indefinite time, at any intermediate place, the non-commissioned officers and soldiers belonging thereto shall be entitled to receive their diet and small beer from the persons on whom they shall be billeted at such intermediate place, for such time only for which they would be entitled to receive the same after arriving at the place of their final destination according to this act. § 6.

And if such halting be only for a day after arrival, and that be a market-day, their diet and small beer shall not be discontinued. § 7.

And it is further enacted, that all non-commissioned officers and private men employed in recruiting, and the recruits by them raised, shall, while on the march, and for two days after the day of their arrival at any recruiting station, be entitled to the same benefits as are hereinbefore provided in regard to troops upon the march: but no recruit enlisted after the two days subsequent to the arrival of the party at their recruiting station shall be entitled to be supplied with diet and small beer at the rates hereinbefore prescribed, except at the option of the person on whom he shall be quartered: provided also nevertheless, that in case any such recruiting party, with the recruits by them raised, shall remove from their station, and after a time shall return to the same place, they and the recruits by them raised, so returning, shall not be again entitled to the supply of diet and small beer for such two days as aforesaid, unless the period between the time of their removal from such place, and their return thereto, shall have exceeded twenty-eight days. § 8.

CHAPTER XIX.

Of Auctioneers.

EVERY auctioneer, on taking out a licence, must give security for the payment of the auction duties; if in London, himself in 1000*l.* and two sureties in 200*l.* each; and if in the country, himself in 500*l.* and two sureties in 50*l.* each.

Here follow some of the most material duties of an auctioneer.

Auctioneers must be well skilled in their duties; and if their employers sustain any damage through them, an action will lie.

If an auctioneer sell the property of his employer for a less sum than he was instructed to do, he will be obliged to make good the difference. And if he sell his principal's goods at a time or in a mode contrary to his express directions, an action of trover may be maintained against him for a conversion.

If an auctioneer pay over the produce of the sale to his employer, having received notice that the goods were not the property of such employer, the real owner of the goods may recover the amount from the auctioneer.

Auctioneers cannot become the purchasers of property entrusted to them to sell, at a less value than its real worth, unless they can prove that the owner of such property was fully acquainted with its value.

A warranty by the auctioneer on a sale of goods made by him pursuant to his authority, will not subject him to answer personally to the purchaser for any breach of the contract, or defect as to the soundness, title, or the like, in the article and commodity set up

to sale, unless from the terms of the warranty it should appear that he has pledged his own responsibility: but, to relieve him, he must disclose the name of his employer; and this must be done at the time of the sale.

By the 29 Car. II. c. 3. § 4. it is enacted, "that no action shall be brought whereby to charge a defendant upon any contract or sale of lands, tenements, or hereditaments, or any interest in, or concerning them, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized."

By the 17th section of the same statute, it is further enacted, "that no contract for the sale of goods, wares, and merchandizes, for the price of ten pounds and upwards, shall be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something as earnest to bind the bargain, or in part of payment, or except some note or memorandum in writing of the same bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized.

With respect to sales of lands under this statute, it was held, in the case of *Stanfield v. Johnson*, that auctioneers are not to be considered as agents of both parties; but in the late case of *Emmerson v. Heelis*, 2 Taunt. 38. it has been decided, that they are agents lawfully authorized by both parties, as well for any interest in land as for goods; and that a note or memorandum in writing of the bargain made and signed by them will be sufficient to give validity to the contract. The signing of the purchaser's name opposite the article bought, has been held a sufficient compliance with the requisites of the statute on the part of the auctioneer.

But if the owner of estates or other property sold by auction, or any other person on his behalf, buy in the same without fraud or collusion, no auction duty will become payable, 19 Geo. III. c. 56. § 12. provided notice be given in writing, 28 Geo. III. c. 37. § 20. to the auctioneer before such bidding, signed by the owner and the person intended to be the bidder, of the latter being appointed by the former, and having agreed accordingly to bid at the sale for his use; and provided the delivery of such notice be verified by the oath of the auctioneer, as also the fairness of the transaction, to the best of his knowledge. And, to exempt a vendor from the payment of the duty, every notice must, at the time appointed by law for the auctioneer's passing his account of the sale, be produced by the auctioneer to the officer authorized to pass the account of such sale, and also be left with the officer. 42 Geo. III. c. 23. § 2.

Any thing which is in the nature of a bidding is within the acts; and therefore where the owner put the price under a candlestick in the room (which is called a dumb bidding), and it was agreed that no bidding should avail if not equal to that, it was held to be within the acts, as being in effect an actual bidding of so

much, for the purpose of superseding smaller biddings at the auction.

But, to bring a bidding within the acts, the sum must be named by the party *eo intuitu*, with a view to the purchase of the estate. Therefore, in the case of *Cruso v. Crisp*, it was decided, that putting up an estate in lots at certain prices was not a bidding within the acts; and, consequently, where the owner intends only to put up the estate at a certain price, and not to bid for it in case of an advance, no previous notice of his intention need be given.

If an estate, &c. be bought in by the owner, and proper notices were not given of his intention to bid, the duty must be paid, however fair the transaction may be.

A statement by an auctioneer to the vendor or his agent, that he has done what is necessary to avoid payment of the duty, will amount to a warranty, although the duty becomes payable, not by the default, but by the ignorance or mistake of the auctioneer.

In the sale of an estate, &c. if the vendor's title prove bad, the auction duty will be allowed, provided a complaint thereof be made before the commissioners of excise, or two justices of the peace, within whose jurisdiction such sale was made, (19 Geo. III. c. 56. § 11.) within twelve calendar months after the sale, if the same shall be rendered void in that time; or otherwise, within three months after the discovery that the owner has no title. 28 Geo. III. c. 37. § 19. But the commissioners will not allow the duty, unless they think that the vendor has used his utmost exertions to make a good title. An appeal, however, lies from the judgment of the commissioners; but, as the king never pays costs, they fall upon the vendor.

Although the duty is by the acts imposed on the vendor, yet he is not restrained from making it a condition of sale, that the duty, or any certain portion thereof, shall be paid by the purchaser, over and above the price bid at the sale by auction; and, in such case, the auctioneer is required to demand payment of the duty from the purchaser, or such portion thereof as is payable by him under the conditions; and, upon neglect or refusal to pay the same, such bidding is declared by the acts to be null and void to all intents and purposes. 19 Geo. III. c. 56. § 8.

If an auctioneer sell an estate without a sufficient authority, so that the purchaser cannot obtain the benefit of his bargain, he, the auctioneer, will be compellable to pay all the costs which the purchaser may have been put to, and the interest of the purchase-money, if it has been unproductive.

If an auctioneer give credit to a vendee, or take a bill or other security for the purchase-money, it is entirely at his own risk, and the vendor can compel him to pay the money.

The auctioneer should not part with the deposit until the sale is carried into effect, because he is considered as a stake-holder or depository of it; and therefore an action will lie against him for recovery thereof, if the purchaser be entitled to recover it.

Unless an auctioneer disclose the name of his principal, an action will lie against him for damages for breach of the contract.

And if any money be paid as a deposit, though short of the sum stipulated by the conditions, and accepted as such by the auctioneer, it will bind the bargain *quoad* the auctioneer.

A bidder at an auction, under the usual conditions, that the highest bidder shall be the purchaser, may retract his bidding any time before the hammer is down.

CHAPTER XX.

Of Pawnbrokers.

By the 25 Geo. III. c. 48. every person exercising the trade of a pawnbroker shall take out a licence, for which he shall pay, if within the bills of mortality, or, by the 44 Geo. III. c. 98. within the cities of London and Westminster, or within the limits of the twopenny-post, 10*l.*; elsewhere, 5*l.*; and shall renew the same annually, ten days at least before the end of the year, on pain of forfeiting 50*l.* to be recovered in the courts at Westminster. — § 1, 3, 4, 12.

Every pawnbroker shall cause his name, and the word *Pawnbroker*, to be put up in large legible characters over the door of his shop, or other place used by him for carrying on such business, on pain of forfeiting 10*l.* for every shop or place made use of for one week without having the same put up; to be recovered, on confession, or oath of one witness, by distress, by warrant under the hands and seals of two justices, half to the informer, and half to the poor; and, for want of sufficient distress, the offender to be committed to gaol or house of correction, not exceeding three calendar months, nor less than fourteen days, unless such penalty and reasonable charges shall be sooner paid. 39 & 40 Geo. III. c. 90. § 23, 26.

The 36 Geo. III. c. 37. being in force for only three years, and till the end of the then next session of parliament, the 39 & 40 Geo. III. c. 99. was substituted in lieu thereof; and thereby it is enacted, that every pawnbroker may demand and take the following rates over and above the principal sum advanced, before he shall be obliged to deliver the goods pawned, *viz.*

For every pledge upon which there shall have been lent not exceeding 2*s.* 6*d.* one halfpenny, for any time not exceeding one calendar month, and the same for every month afterwards, including the current month in which such pledge shall be redeemed, although such month shall not be expired :

If 5s. shall have been lent thereon, 1d.	
7s. 6d.	1½d.
10s.	2d.
12s. 6d.	2½d.
15s.	3d.
17s. 6d.	3½d.
1l.	4d.

And so on progressively and in proportion for any sum not exceeding 40s.; and if exceeding 40s. and not exceeding 42s.—8d.; and if exceeding 42s. and not exceeding 10l. after the rate of 3d. for every 20s. by the calendar month, including the current month, and so in proportion for any fractional sum; which said several sums shall be in lieu of, and taken as a satisfaction for all interest due, and charges for warehouse room. 39 & 40 Geo. III. c. 99. § 2.

And where any intermediate sum lent upon pawn shall exceed 2s. 6d. and not amount to 40s., the person lending the same may take a profit as aforesaid of 4d. and no more for the loan of 20s. by the calendar month, including the current month as aforesaid. § 3.

But the party entitled to and applying for the redemption of goods pawned, within seven days after the end of the first calendar month after the same have been pledged, may redeem the same without paying any thing by way of profit to the broker for the said seven days, or such part thereof as shall then have elapsed; and, after the expiration of the first seven days, and before the expiration of the last fourteen days of the second calendar month, he may redeem such goods upon paying the profit payable for one calendar month and a half; but if after the expiration of the first fourteen days, and before the end of the said second calendar month, the broker may take a profit of the whole second calendar month; and the like regulation and restriction shall take place in every subsequent calendar month, wherein application shall be made for redeeming goods pawned. § 5.

In all cases where the lowest fraction of the sum to be received by any pawnbroker from persons offering to redeem goods shall be a farthing, and such person shall have paid the sum due, except the last farthing, and shall not produce a current farthing, but in lieu thereof shall tender a halfpenny, such pawnbroker shall in exchange deliver to such person redeeming such goods, one good and lawful farthing, or, in default thereof, shall abate the remaining farthing from the sum total. § 4.

Every pawnbroker shall cause to be painted or printed, in large legible characters, the rate of profit allowed by this act to be taken, and also the various prices of the notes or memorandums to be given according to the rates aforesaid, and an account of such as are to be given *gratis*, and of the expence of obtaining a second note or memorandum, where the former one has been lost, mislaid, destroyed, or fraudulently obtained; and place the same in some conspicuous part of the shop or place where such business is carried on, so as to be visible to the person pledging or redeeming goods. § 22.

Every person who shall take any goods by way of pawn, pledge, or exchange, whereon shall be lent above 5s. shall, before he advance or lend any money thereon, enter in a fair and regular manner, in a book to be kept for that purpose, a description of such goods, and the sum lent thereon, with the day and year, and the name of the person by whom they were pawned, and the name of the street, and number of the house (if numbered), where such person shall abide, and whether he be a lodger in or keeper of such house; by using the letter L. if a lodger, and the letter H. if a housekeeper, and also the name and place of abode of the owner according to the information of the person so pawning the same; into all which circumstances he is required to inquire of the party, before any money shall be advanced; and if the sum lent shall not exceed 5s. such entry shall be made within four hours after the said goods shall have been pawned. And every pledge upon which shall be lent above 10s. shall be entered in a book to be kept for that purpose, separate from all other pledges; and every such entry shall be numbered in such book progressively, as they are pawned, in the following manner: *viz.* the first pledge that is received in pawn in September next, No. 1; the second No. 2; and so on progressively until the end of the month; and the first pledge in the next month shall be numbered 1, and the second 2, and so on progressively in like manner until the end of that month; and so on in every succeeding month throughout the year; and upon every note respecting such pledge shall be written the number of entry of such pledge so entered in such book as aforesaid. And at the time of taking every pawn, a note or memorandum, written or printed, shall be given to the person pawning the same, containing a description of such goods received in pawn, and also the money advanced thereon, with the day and year, and the names and places of abode, and numbers of the houses of the parties, and whether lodgers or housekeepers, by using the letters aforesaid: and upon such note or memorandum or on the back thereof, shall be written or printed the name and place of abode of such broker, which note or memorandum the party pawning such goods is required to take; and unless he shall take the same, such broker shall not receive and retain such pledge; and such note, where the sum lent is under 5s. shall be given *gratis*.

If the sum lent is 5s. and under 10s. such broker may take $\frac{1}{2}d$.

10s. 20s. 1d.

20s. 5l. 2d.

5l. and upwards 4d.

Which note shall be produced to the broker before he shall be obliged to re-deliver such goods, except as hereafter is excepted. § 6.

And in all cases where goods pawned shall be redeemed, the pawnbroker shall write or indorse upon every duplicate the profit taken by him, and shall keep such duplicate in his custody for one year next following. § 7.

If any person shall knowingly and designedly pawn, or exchange,

or unlawfully dispose of the goods of any other person, not being employed or authorized by the owner so to do, one justice may grant his warrant to apprehend such offender; and if he shall be thereof convicted by the oath of one witness, or on confession, before such justice, he shall forfeit not more than 5*l.* nor less than 20*s.* and also the value of the goods; and if not forthwith paid, the said justice shall commit him to the house of correction or some other public prison of the place where he shall reside or be convicted, there to remain and be kept to hard labour, for not more than three calendar months, unless the forfeiture shall be sooner paid; and if within three days before the expiration of the said term of commitment the forfeiture shall not be paid, the justice may order such person to be publicly whipped in such house of correction or prison, or in some open public place of the county, city, division, town, or place, wherein the offence shall have been committed, as he shall think proper. The said forfeitures, when recovered, to be applied towards making satisfaction thereout to the party injured, and defraying the costs of the prosecution, as shall be adjudged reasonable by such justice; but if the party injured shall decline to accept of such satisfaction and costs, or if there be any overplus of the same, then such forfeitures or overplus shall be paid to the overseers for the use of the poor of such parish or place. § 8.

If any person shall counterfeit, forge, or alter any such note or memorandum, or procure the same to be done, or shall utter, vend, or sell such note, knowing the same to have been counterfeited, forged or altered, with intent to defraud any person, such offender shall be punished as hereinafter mentioned; and any person, or his servant, or agent, to whom such note shall be uttered or offered, which he shall have reason to suspect has been counterfeited, forged, or altered, may seize the person offering the same and deliver him to a constable, who shall convey him before some justice of the peace where such offence is supposed to have been committed; and if, upon examination, it shall appear to the satisfaction of such justice, that such person is guilty, he shall commit him to the gaol or house of correction of the county or place where such offence was committed, for any time not exceeding three calendar months, § 9.

If any person who shall offer by way of pawn, pledge, exchange, or sale, any goods, shall not be able, or shall refuse to give a satisfactory account of himself, or of the means by which he became possessed thereof, or shall wilfully give any false information as to whether such goods are his own property or not, or of his name and place of abode, or of the name and place of abode of the owner of such goods, or if there shall be any other reason to suspect that such goods are stolen, or otherwise illegally or clandestinely obtained; or if any person not entitled, nor having any colour of title by law to redeem such goods, shall attempt to redeem the same, it shall be lawful for any person, his servant or agent, to whom the same shall be offered, to seize and detain such

person and the said goods, and to deliver him immediately into the custody of a constable, who shall, as soon as may be, convey such person and the said goods before a justice; and if such justice shall, upon examination and inquiry, have cause to suspect that the said goods were stolen, or illegally or clandestinely obtained; or that the person offering to redeem the same, hath not any pretence or colour of right so to do, he shall commit such person into safe custody for such reasonable time as shall be necessary for obtaining proper information, in order to be further examined; and if, upon either information, it shall appear to the satisfaction of such justice, that the said goods were stolen, or illegally or clandestinely obtained, or that the person offering to redeem the same hath not any pretence or right so to do, he shall commit such offender to the gaol or house of correction of the county or place where the offence was committed, to be dealt with according to law: where the nature of the offence shall authorize such commitment by any other law, then the same shall be for any time not exceeding three calendar months, at the discretion of such justice. § 10.

If any person shall knowingly buy, or take in pawn, or exchange, any goods of any manufacture, either mixed or separate, or any materials plainly intended for manufacture, or put into a state or course of manufacture, before such goods are finished for the purpose of wear; or any linen or apparel which are entrusted to any person to wash, scour, iron, mend, manufacture, work up, finish, or make up; and shall be convicted thereof, upon confession, or on the oath of one witness, before one justice, he shall forfeit double the sum given for or lent on the same, to be paid to the poor, and to be recovered in like manner as other penalties are by this act directed; and such goods or materials shall also be restored to the owner in the presence of such justice. § 11.

If the owner of any goods of any manufacture, either mixed or separate, or any materials plainly intended or put into a state for manufacturing, and before the same is completed for wear, or any linen or apparel so entrusted to wash, &c. as aforesaid, which shall be unlawfully pawned or exchanged, shall make out, either on his oath or the oath of one witness, before one justice, that there is just cause to suspect, that any person has taken in pawn or exchange any such goods without his knowledge, and shall make appear probable ground for such suspicion, such justice may issue his warrant for searching, within the hours of business, the house, warehouse, or other place of any such person who shall be charged on oath as suspected of having received the same without the privy of the owner: and if the occupier of any such place shall, upon request being made to him by any peace-officer authorized to search, refuse to open such place, and permit such search to be made, such peace-officer may break open any such house, warehouse, or place, within the hours of business, and search as he shall think fit for the goods suspected to be there, doing no wilful damage; and if, upon such search, any such goods so pawned

or exchanged shall be found, and the property of the owner shall be made out to the satisfaction of such justice, by the oath of one witness, or by the confession of the person charged, such justice shall cause the goods so found to be forthwith restored to the owner. § 12.

And if the owner of any goods unlawfully pawned, pledged, or exchanged, shall make out, either on his oath, or by the oath of one witness, before one justice, that such owner hath had his goods unlawfully obtained or taken from him, and that there is just cause to suspect that any person within the jurisdiction of such justice hath knowingly and unlawfully taken to pawn, or by way of pledge, or in exchange, any goods of such owner, and without his privity or authority, and shall make appear to the satisfaction of such justice probable grounds for such the owner's suspicion, he may issue his warrant for searching, within the hours of business, the house, warehouse, or other place of any such person so charged as aforesaid; and if the occupier thereof shall, on request to him made to open the same by any peace-officer authorized to search there by warrant of such justice, refuse to open and permit the same to be searched, it shall be lawful for such peace-officer to break open any such house, warehouse, or other place, within the hours of business, and to search, as he shall think fit, therein for the goods suspected to be there, doing no wilful damage; and no person shall oppose or hinder any such search; and if, upon search, any of the goods shall be found, and the property of the owner shall be made out to the satisfaction of such justice, by the oath of one witness, or confession, such justice shall thereupon cause the same to be forthwith restored to the owner. § 13.

If any goods shall be pawned or pledged for securing any money lent thereon, not exceeding in the whole the principal sum of 10*l*. and the profit thereof, and if within one year after the pawning thereof, (proof having been made on oath by one witness, and by producing the note or memorandum directed to be given by this act as aforesaid before any such justice, of the pawning of such goods within the said space of one year, or one year and three months, as the case may be), any such pawner who was the real owner of such goods at the time of the pawning thereof, shall tender to the person who lent on security of the said goods the principal money borrowed thereon, and profit according to the rates by this act established; and if the person who took the goods in pawn shall thereupon neglect or refuse to deliver back the goods so pawned for any sum not exceeding the said principal sum of 10*l*. to the person who borrowed the money thereon; in such case, on oath thereof made by the pawner, or some other credible person, any justice of the place where the person who took such pawn shall dwell, on the application of the borrower, shall cause such person to come before him, and shall examine on oath the parties themselves, and such other credible persons as shall appear before him, touching the premises; and if tender of the principal money due, and all profit thereon, shall be proved

by oath to have been made within the said space of one year (or one year and three months, as the case may be); then, on payment by the borrower of such principal money, and the profit due thereon as aforesaid to the lender, and in case the lender shall refuse to accept thereof on tender before such justice, he shall thereupon, by order under his hand, direct the goods so pawned forthwith to be delivered to the pawner; and if the lender shall neglect or refuse to deliver up, or make such satisfaction for such goods as aforesaid as such justice shall order, then he shall commit the party refusing to the house of correction, or some other public prison, until he shall deliver up the said goods according to the order of such justice, or make satisfaction for the value thereof to the party entitled to the redemption. § 14.

And whereas inconveniences have arisen to pawnbrokers from several different persons claiming a property in the same goods; for remedy whereof it is enacted, that the person who shall produce such note or memorandum as aforesaid, and require a delivery of the goods mentioned therein, shall be deemed the owner; and such pawnbroker, after receiving satisfaction respecting principal and profit as aforesaid, shall deliver such goods to the person producing such note or memorandum, and he shall be indemnified; unless he shall have had previous notice from the real owner not to deliver such goods, or notice that the same are suspected to have been fraudulently or feloniously taken or obtained; and unless the real owner proceed in manner hereafter mentioned for redeeming goods pledged, where such note or memorandum hath been lost, mislaid, destroyed, or fraudulently obtained from the owner thereof. § 15.

In case such pawnbroker shall have had such notice as aforesaid, or if any such note or memorandum shall be lost, mislaid, destroyed, or fraudulently obtained from the owner, and the goods mentioned therein shall remain unredeemed, the broker with whom such goods were pledged, at the request of any person who shall represent himself as the owner thereof, shall deliver to such person a copy of such note or memorandum; with the form of an affidavit of the particular circumstances attending the case written thereon, as the same shall be stated to him by the party applying; for which copy and affidavit, in case the money lent shall not exceed 5*s.* the broker shall receive one halfpenny; and if above 5*s.* and not exceeding 10*s.* he shall receive 1*d.*; and if above 10*s.* he shall receive the like sum as he is entitled to take on giving the original note or memorandum, to be paid by the person applying. And the person having obtained such copy and form of an affidavit shall thereupon prove his property in such goods to the satisfaction of some justice, and also verify on oath the truth of the particular circumstances attending the case mentioned in such affidavit; the taking of such oath to be authenticated by the hand-writing of such justice. Whereupon the broker shall suffer the person proving such property to redeem such goods, on leaving such note or memorandum and affidavit with such broker. § 16.

And all pawned goods shall be deemed forfeited, and may be sold, at the expiration of one year from the time of pawning the same; and where the sum lent thereon shall be above 10s. and not exceeding 10*l*. shall be sold by public auction, but not otherwise, by the broker; and the same shall be exposed to public view, and a catalogue thereof published; and an advertisement, giving notice of such sale, and containing the name of such broker, shall be inserted on two several days in some public newspaper, two days at least before the first day of sale, on pain of forfeiting to the owner 10*l*. § 17.

But if any person entitled to redeem such goods shall, before the end of the year, give notice in writing, or in the presence of one witness, to the person who has the same in pawn, or leave such notice at his usual place of abode, not to sell such goods at the end of the said year, the same shall not be sold until three calendar months from the end of the said year; during which three months the owner shall have liberty to redeem the said goods on the terms aforesaid. § 18.

Provided, that all pictures, prints, books, bronzes, statues, busts, carvings in ivory or marble, cameos, intaglios, musical, mathematical, and philosophical instruments, and china, which shall be sold by public auction, as directed by the act in cases of other pawns, shall be sold by themselves, and without any other goods being sold at such sale, four times only in every year; viz. on the first Monday in the months of January, April, July, and October yearly, and on the following days, if the sale shall exceed one day, and at no other time; and the auctioneer shall cause the same to be exposed to public view, and catalogues thereof to be published, and an advertisement giving notice of such sale, and containing the name of the pawnbroker, which shall be inserted in some public newspaper two several days, three days, at the least before the day of sale, upon pain of forfeiting to the owner of such goods any sum not exceeding 5*l*. nor less than 40s. § 19.

Every pawnbroker shall enter into a book to be kept for that purpose a just account of the sale of such goods, expressing the day when, and the money for which the same were sold, together with the name and place of abode of the auctioneer and purchaser; and if such goods are sold for upwards of 10s. or for more than is due thereon, the overplus shall be paid on demand to the person by whom or on whose account such goods were pawned, if such demand be made within three years after such sale, the necessary costs and charges of such sale being first deducted; and the person who pawned such goods, or for whom they were so pawned, shall, for his satisfaction, be permitted to inspect the entry made of such sale, paying for such inspection 1*d*. and no more. And if any person shall refuse the person who pawned such goods to inspect such entry, or if he be an executor, administrator, or assignee, at such time producing his letters testamentary, letters of administration or assignment; or if the goods were sold for more than the sum entered in such book; or if such person shall not have made such

entry; or shall not have *bond fide* sold the goods for the best price; and according to the directions of this act; or shall refuse to pay such overplus on demand as aforesaid; he shall forfeit 10*l.* and treble the sum such goods were originally pawned for; to the person by whom or on whose account they were pawned; to be levied by distress, by two justices where the offence shall be committed. § 20.

No person having goods in pawn, shall, either by himself or other person, purchase any such goods during the time they shall remain in his custody upon such pawn (except at such public auction); nor shall suffer the same to be redeemed with a view or intention of purchasing thereof; nor make any contract with any person offering to pawn the same, or with the owner of the pawn, for the purchase, sale, or disposition of the said goods, before the end of one year from the time of pawning the same; nor shall purchase, receive, or take any goods in pawn from any person who shall appear to be under the age of twelve years, or to be intoxicated with liquor; or purchase or take in pawn or exchange the note or memorandum aforesaid of any other broker; nor buy any goods in the course of his trade before eight o'clock in the morning, nor after seven in the evening; nor employ any servant or apprentice or other person under sixteen years of age, to take in any pawn; nor receive any goods by way of pawn or exchange before eight in the morning nor after nine in the evening, between Michaelmas-day and Lady-day, nor before seven in the morning and after ten in the evening the remainder of the year, except only on the evenings of Saturdays throughout the year, and the evenings preceding Good Friday and Christmas-day, and every fast or thanksgiving-day appointed by his majesty: on which days, and on Sundays, no person shall carry on the trade of a pawnbroker. § 21.

And if it shall appear, or be proved upon oath before a justice, that the goods pawned as aforesaid have been sold before the time limited, or embezzled, or lost, or become of less value than when pawned, through the neglect or wilful misbehaviour of the person to whom they were pawned, such justice shall award a reasonable satisfaction to the owner in respect of such damage; and the sum so awarded, in case the same shall not amount to the principal and profit due to such broker, shall be deducted thereout; and it shall be sufficient for the pawner to pay or tender the balance, and, upon so doing, such justice shall proceed as if the pawner had paid or tendered the whole money due for principal and profit as aforesaid: and if such satisfaction to be allowed shall be equal to or exceed the principal and profit as aforesaid, then such broker shall deliver the goods so pledged to the owner, without being paid any thing for principal or profit, and shall also pay such excess (if any), on penalty of 10*l.* to be recovered in manner hereinafter mentioned. § 24.

And on every occasion where such justice shall think the production of any book, note, voucher, memorandum, duplicate, or other paper necessary, which shall or ought to be in the hands or power

of any broker, he shall summon him to attend with the same, which he is required to produce in the state the same was made at the time the pawn was received, without any alteration, erasure, or obliteration whatsoever; and in case he shall neglect to attend, or to produce the same in its true and perfect state, he shall, unless he shew good cause to the satisfaction of such justice, forfeit not exceeding 10*l.* nor less than 5*l.* to be levied as hereafter mentioned. § 25.

But no person shall be liable for any prosecution before any justice, unless information be given within twelve calendar months next after the offence was committed; and such prosecution shall be before some neighbouring justice, where the offence shall have been committed; except in London. § 27.

And the churchwardens or overseers of the parish or place where any offence shall be supposed to have been committed, or some one of them, at the discretion of such justice, on having notice from him for that purpose, shall prosecute such offender at the expence of such parish or place. § 28.

But nothing herein shall extend to any person who shall lend money upon pawn or pledge at the rate of 5*l.* per cent. interest, without taking any greater profit for the loan thereof. § 25.

And no person who has been convicted of any fraud, or of obtaining money under false pretences, or of any felony, shall prosecute or inform against any person for any offence against this act. § 29.

And all the provisions of this act shall extend to and include the executors, administrators, and assigns, of every deceased pawnbroker, as if he were living, except that no such executor or administrator shall be answerable for any penalty personally, or out of his own estate, unless forfeited by his own act. § 31.

In case any pawnbroker shall offend against this act, in neglecting to make in a fair and regular manner, in such book as aforesaid, any such entry as is hereby required, he shall forfeit for each offence not exceeding 10*l.* as to such justice shall seem reasonable and fit; and for every other offence, where no other penalty is imposed, not more than 10*l.* nor less than 40*s.*; the same respectively to be levied by distress and sale, half to the person complaining, and half to the poor, if not herein otherwise disposed of and applied. § 26.

By the 30 Geo. II. c. 24. § 16. any justice unto whom complaint upon oath shall be made of any offence committed against this act shall issue his warrant for bringing before him, or some other justice of such place, the person charged with the offence; and the justice before whom he is brought shall hear and determine the matter, and proceed to judgment and conviction. And if it shall appear upon oath, to the satisfaction of such justice, that any person within his jurisdiction can give material evidence on behalf of the prosecutor or of the person accused, and who will not voluntarily appear, he shall issue his summons to convene him to give his evidence; and if he shall neglect or refuse to appear in such summons, and no just excuse shall be offered, then (on proof, upon oath, of the

summons having been served upon him) he shall issue his warrant to bring such witness before him; and on his appearance, if he shall refuse to be examined on oath, without offering just cause for such refusal, the justice shall commit him to the public prison for any time not exceeding three months; and if, on such examination, the justice shall deem the evidence of any such witness to be material, he may bind over such witness, unless a feme-covert, or under the age of twenty-one years, by recognizance in a reasonable penalty, to appear and give evidence at the next sessions or assizes.

And no person charged on oath with being guilty of any of the offences punishable by this act, and which shall require bail, shall be admitted to bail before twenty-four hours notice at least shall be proved by oath to have been given in writing to the prosecutor of the names and places of abode of the persons proposed to be bail for any such offender; unless the bail offered shall be well known to the justice, and he shall approve of them. And every such offender who shall be bound over to the sessions or assizes shall be tried at the next sessions or assizes to be held after his being apprehended, unless the court shall think fit to put off the trial, on just cause made out to them.

No fee or gratuity shall be taken for any summons or warrant of any justice, so far as the same relates to goods pawned, pledged, taken in exchange, or unlawfully disposed of. § 13.

CHAPTER XXI.

Agricultural Laws.

IN many parts of this work will be found subjects interwoven with the interests and concerns of the farmer; what is now proposed in this Chapter is, to collect some of the most useful of those laws relating to this body of men, which have not been noticed in other parts of our work.

Of Butter and Cheese.

By the 36 Geo. III. c. 86. § 19. the 13 & 14 Car. II. c. 26. and so much of the 4 W. c. 7. as discharges persons from the effect of any part of the 13 & 14 Car. II. for preventing frauds in the sellers after the factor or buyer has contracted for the same, are repealed; and new regulations are made respecting the packing, weight, and sale of butter, as follow:—

Every cooper or other person who shall make any vessel for the packing of butter shall make the same of good and well-seasoned

timber, and tight, and not leaky, and shall groove in the heads and bottoms thereof; and every such vessel shall be a tub, firkin, or half-firkin, and no other, which shall, when delivered by such cooper or person making the same, be of the weight and proportions, and capable of containing the several quantities of butter hereinafter mentioned: *viz.* Every *tub* shall weigh of itself, including the top and bottom, not less than 11 lb. nor more than 16 lb. avoirdupois weight, and neither such top or bottom shall be more than five-eighths of an inch thick in any part thereof, and shall be capable of containing 84 lb. of butter, and not less: every *firkin* shall weigh of itself, including the top and bottom, not less than 7 lb. nor more than 11 lb. and neither the top or bottom, shall be more than four-eighths of an inch thick in any part, and shall be capable of containing not less than 56 lb. of butter: and every *half-firkin* shall weigh of itself, including the top and bottom, not less than 4 lb. nor more than 6 lb. and neither the top or bottom shall be more than three-eighths of an inch thick in any part, and shall be capable of containing not less than 28 lb. of butter; on pain of forfeiting, by the cooper or other person making the same, 10s. for every such vessel. § 1.

And every such maker, before such vessel shall go out of his possession, shall, on the outside of the bottom, with an iron, brand his name at full length, in permanent and legible letters, together with the exact weight or tare thereof, on the like penalty. § 2.

And every such maker shall moreover mark in like manner on the bottom of every such vessel, in addition to his name, his place of abode or dwelling, in the following manner; *viz.* if he dwell in a city or market-town, then the name thereof; if in a village, township, or other division of a parish, then the name of the parish wherein the same is situate; and if in an extra-parochial place, then the name of the next adjoining parish; on pain of forfeiting 10s. for every such offence. 38 Geo. III. c. 73. § 1.

And every factor or agent for buying or selling butter for others, who shall buy, sell, or offer for sale, or have in his custody for sale, or shall order, consign, forward, or send any vessel containing butter for sale, which shall not be made, and externally marked, and have the weight of butter therein imprinted, according to the directions of this and the above act, shall forfeit 20s. for every such offence. § 2.

And every cheesemonger, or seller or dealer in butter on his own account, who shall offer for sale, or have in his possession for sale, any vessel containing such butter, which shall not be externally marked as aforesaid, shall forfeit 10s. for every such offence. § 3.

And every dairyman, farmer, or seller of butter, or other person who shall pack any butter for sale, shall pack the same in such vessels as aforesaid, and no other; and shall properly soak and season such vessels before such packing therein; and when so seasoned, shall, on the bottom thereof on the inside, and on the top on the outside, with an iron, brand his name at full length in like

letters; and also on the outside of the top, and on the bouge or body thereof, the true weight or tare of such empty vessel when so seasoned, and also his name in like manner on the bouge or body across two different staves at least, to prevent the same being taken out and changed; and shall distinctly and at full length imprint his name upon the top of the butter in such vessel when filled; on pain of forfeiting 5*l.* for every such offence. 36 Geo. III. c. 86. § 3.

And every dairyman, farmer, or seller of butter, or other person packing butter for sale, shall (exclusive of the tare of such vessel) pack in every tub not less than 84 lb. firkin 56 lb. and half firkin 28 lb. of good and merchantable butter; and no butter which is old or corrupt shall be mixed or packed up in any such vessel with that which is new and sound, nor shall any whey butter be packed or mixed with that which is made of cream, but every such vessel shall be of one sort and goodness throughout; and no butter shall be salted with great salt, but with fine small salt, and not intermixed with more than is needful for its preservation; on pain of forfeiting 5*l.* § 4.

And every cheesemonger, dealer in butter, or other person who shall sell any tub, firkin, or half firkin, shall deliver therein the full quantity aforesaid, and in default shall be liable to an action for recovery of satisfaction with costs. § 5.

And if any change, alteration, fraud, or deceit, shall be used or practised, either in the vessel wherein the butter is packed for sale as aforesaid, or in the butter itself, whether in quantity, quality, weight, or otherwise, or in any such brands or marks as aforesaid, or in the staves whereon the same shall be placed, or in any other manner howsoever, after the packing thereof for sale as aforesaid; every person concerned therein shall forfeit 30*l.* for every such offence. § 6.

And no cheesemonger, dealer, or other person, shall repack for sale any butter in any such vessel as aforesaid; on pain of forfeiting 5*l.* for every tub, firkin, or half-firkin so repacked. § 7.

Provided, that no person shall be liable to any of the penalties of this act for using any such vessel as aforesaid, after the *British* butter packed therein hath been taken thereout, for the repacking for sale any foreign butter, and who shall first entirely cut out or efface the names of the original dairyman, farmer, or seller, leaving the name and tare of the cooper, and the tare of the original dairyman, farmer, or seller thereon, and shall afterwards with an iron brand his name in words at length, and the words *Foreign Butter* in permanent and legible letters, upon the bouge or body of every such vessel, across two staves at the least, to denote that such butter is foreign butter. § 8.

And if any person shall hereafter be convicted of counterfeiting or forging any name or mark of any such owner, or farmer, or dairyman, as aforesaid, or any part thereof, or cause the same to be done, he shall forfeit 40*l.* § 9.

All penalties above 5*l.* are to be recovered in the courts at

Westminster. And all offences against this act, the mode of determining which is not hereinbefore prescribed, and where the penalties shall not exceed 5*l.* may be heard and determined by one justice, who, on proof upon oath by one witness, may levy such penalties by distress and sale of the offender's goods (returning the overplus, after deducting the costs), to be applied to the use of the informer; and for want of sufficient distress, or if such penalty be not forthwith paid, such offender may be committed to the gaol or house of correction, without bail, for not exceeding three calendar months, nor less than twenty-eight days, unless such penalty and reasonable charges be sooner paid. 36 Geo. III. c. 86. § 10; 38 Geo. III. c. 73. § 4.

And if any person shall think himself aggrieved by the judgment of the said justice, he may appeal to the next sessions, who, upon receiving such conviction drawn up as aforesaid, may hear and determine the same, and may award costs to either party, as to them shall seem meet. § 11, 12.

And no such conviction shall be set aside by such sessions for want or form, if the material facts alleged therein be proved to their satisfaction; nor shall the same be removed by *certiorari* into any other court. § 13.

Provided, that nothing herein shall extend to the packing of butter in any pot or other vessel not capable of containing more than 14*lb.* § 16.

Provided also, that every information, prosecution, or suit, shall be commenced within four months after the offence committed. § 17.

Cattle.

For the encouragement of farms, and to prevent the accumulation of farms in a few hands, it is enacted by the 28 Hen. VIII. c. 13. that no person shall have more than 2000 sheep, at six score to the hundred, over and above what is necessary for his household, except it be upon his own inheritance only; on pain of forfeiting 3*s.* 4*d.* for every sheep above that number. Provided, that lambs shall not be accounted sheep till the second Midsummer after they are yeaned.

And if any person, by reason of being executor or administrator, shall happen to have more, he shall sell off within a year the surplus above two thousand.

By 3 & 4 Edw. VI. c. 19. no person shall buy or sell any ox, steer, runt, cow, heifer, or calf, and sell the same alive again in the same market or fair; on pain of forfeiting double the value, half to the king, and half to him that shall sue.

Corn.

To buy or sell corn in the sheaf, before it is threshed and measured, is against the common law of England; because by such sale the market is in effect forestalled.

By 22 Car. II. c. 8. if any person shall sell corn otherwise than by Winchester measure sealed and stricken by the brian, he shall,

forfeit 40s. to the use of the poor; and, in default of payment, be imprisoned till paid.

And, moreover, every person who shall sell or buy corn without measuring, being thereunto required, or in any other manner than is by the 22 Car. II. c. 8. directed, and that without the shaking of the measure by the buyer, shall, besides the penalty of that act, forfeit all the corn so bought or sold, or the value thereof, to the party complaining. 22 & 23 Car. II. c. 12.

And no custom or prescription shall prevail against the uniformity of measures, notwithstanding such custom may have existed beyond all memory, and have been used without interruption.

Gleaning.

It has been said, that by the common law and custom of England, the poor are allowed to enter and glean upon another's ground after the harvest, without being guilty of trespass; but it is now positively settled, that a right to glean in the harvest-field cannot be claimed by any person at common law; neither have the poor of the parish, legally settled, such a right.

Sale of Horses in Fairs.

By the 2 & 3 P. & M. c. 7. and 31 Eliz. c. 11. the keeper of every fair or market shall yearly appoint a certain special and open place, where horses shall be sold, in any fair or market overt;

And shall appoint one or more persons to take toll there, and to keep the same place from ten in the forenoon till sun-set.

And the sale or exchange in any fair or market overt of any stolen horse shall not alter the property, unless the same shall be in the time of the said fair or market openly ridden, led, walked, driven, or kept standing, for one hour together at least, between ten of the clock and sun-set, in the open place of the fair or market wherein horses are commonly used to be sold, and not within any house, yard, backside, or other privy or secret place;

Nor unless all the parties to the bargain shall come together, and bring the horse to the open place appointed for the toll-taker, or the book-keeper where no toll is due;

Nor unless such toll-taker there, or (where no toll is paid) the book-keeper, or chief officer of the fair or market, shall take upon him perfect knowledge of the seller, and of his true christian name and surname and place of abode, and shall enter all the same, to his knowledge, in a book to be kept for that purpose; or else that the seller shall bring to the toll-taker or other officer aforesaid one credible person, who shall testify that he knows the seller, and his true name, surname, mystery, and dwelling-place, and there enter the same, and also the name, surname, mystery, and dwelling-place of him that so avouches his knowledge;

Nor unless he also cause to be entered the very true price;

And also the colour, and one special mark at least;

And also the buyer to pay the toll, if any be due; if not, then to give 1d. for the entry.

Which done, the person entering the same shall give to the

buyer, requiring and paying 2*d.* for the same, a note in writing of all the contents of such entry, subscribed with his hand.

Every person offending in any of the premises shall forfeit 5*l.* half to the king, and half to him that shall sue before the justices in sessions, or in any ordinary court of record; and the sale shall be void; and the owner may seize and take his horse, or have an action of detinue or replevin for the same.

And if any horse shall be stolen, and after shall be sold in open fair or market, and the sale shall be used in all points as aforesaid; yet, nevertheless, such sale in six months after the felony done shall not take away the owner's property, so as the claim be made within six months, where the horse shall be found, before the mayor if in a town corporate, or else before a justice near the place where found, and so as proof be made before such magistrate in forty days next ensuing, by two witnesses, that the property of such horse was in the party claiming, and was stolen from him within six months next before such claim: but the party from whom the same was stolen may at all times after, notwithstanding such sale, take again the said horse on payment, or readiness to offer to the party who hath possession, so much as he shall swear before such magistrate that he paid for the same.

Servants employed in Husbandry.

By 20 Geo. II. c. 19. all complaints and disputes between masters and servants employed in husbandry, or artificers, and handicraftsmen, respecting their wages, may be heard and determined by one justice, who may examine upon oath any such servant or artificer, and make such order for payment of so much wages as seem just, provided the sum in question does not exceed 10*l.* with regard to any servant, or 5*l.* with regard to any artificer; and in case of refusal or nonpayment for the space of twenty-one days after the determination, he may direct the same to be levied by distress and sale of the goods of the master or mistress. And by 5 Eliz. c. 5. if any master or mistress shall put away such servant before the end of the term for which he has been hired, unless for just cause to be allowed, or without one quarter's warning, such master or mistress, unless he or she produce, by two witnesses, such cause or warning before the justice, shall forfeit 40*s.*

And if any servant retained according to this statute shall depart before the end of his term, unless it be for some reasonable cause allowed as aforesaid; or at the end of his term, without a quarter's warning, before two witnesses; or if any person bound to serve in husbandry, or other art, by the year or otherwise, refuse to serve, or promise to serve, and do not serve; he may, upon complaint, be committed to ward, until he be bound to serve.

And every artificer and labourer retained to work by the piece shall not depart from his master's service, leaving his work unfinished, unless it be that his wages be unpaid, or that he be taken to serve the king, or for some other lawful cause, or with the licence of his master; upon pain of imprisonment for one month, and of forfeiting 5*l.* to the party injured.

All artificers and labourers, being hired for wages by the day or week, shall, between the middle of March and September, be at their work at five o'clock in the morning, and continue until between seven and eight at night, except the time of breakfast, dinner, and drinking, which shall not exceed two hours and a half, viz. at drinking one half hour, for dinner one hour, and for sleep where they are allowed to sleep, which is from the middle of May to the middle of August, half an hour: and the said artificers and labourers, between the middle of September and the middle of March, shall be at work at the spring of day until night, except in time of breakfast and dinner, on pain of forfeiting one penny for every hour's absence, to be deducted out of their wages.

And no person so retained in husbandry, or in any of the arts aforesaid, shall depart forth of one city, town, or parish to another, nor out of the lathe, rape, wapentake, hundred, nor out of the county he last served, to serve in any other city, &c. unless he procure a testimonial under the seal of such city or town, or of the constable or other head-officer, and two householders of such city, town, or parish.

Which testimonial shall be delivered to the servant, and registered by the parson of the parish, taking two-pence for the same.

And no person departing from one service shall be retained into any other, without shewing before his retainer such testimonial to the chief officer of the town corporate, and in every other town or place to the constable, curate, churchwarden, or other head-officer, where he shall be retained, upon pain that such servant so departing without such testimonial shall be imprisoned until he procure one; which if he cannot do within twenty-one days, he shall be whipped and used as a vagabond. And it is further provided, that every person retaining such servant without producing a testimonial shall forfeit 5*l.*; and that every servant producing a false testimonial, shall be whipped as a vagabond.

For further regulations between masters and servants, see *page* 372.

CHAPTER XXII.

Of Factors, or Agents.

By 4 Geo. IV. c. 83. any person or persons entrusted for the purpose of sale with any goods, wares, or merchandize, and by whom such goods, wares, and merchandize shall be shipped in his, her, or their own name or names, or in whose name or names any goods, wares, or merchandize shall be shipped by any other person or persons, shall be deemed and taken to be the true owner or owners thereof, so far as to entitle the consignee or consignees of such goods, wares, and merchandize, to a lien thereon in respect of any money or negotiable security advanced to or for the use of such person or persons, or in respect of any money or

negotiable security or securities received by him, her, or them, to the use of such consignee or consignees, in the like manner to all intents and purposes as if such person or persons was or were the true owner or owners of such goods, wares, and merchandize; provided such consignee or consignees shall have notice, by the bill of lading for the delivery of such goods, wares, or merchandize, or otherwise, at or before the time of any advance of such money or negotiable security, or of such receipt of money or negotiable security, in respect of which such lien is claimed, that such person or persons so shipping in his, her, or their own names, or in whose name or names any goods, wares, or merchandize shall be shipped by any person or persons, is or are not the actual *bona fide* owner or owners, proprietor or proprietors of such goods, wares, and merchandize so shipped as aforesaid: provided also, that the person or persons in whose name or names any such goods, wares, or merchandize are so shipped as aforesaid, shall be taken for the purposes of this act to have been entrusted therewith, unless the contrary thereof shall be shewn in evidence by any person disputing such fact. § 1.

And it is further enacted, that it shall be lawful to and for any person or persons, body or bodies politic or corporate, to accept and take any goods, wares, or merchandize, or the bill or bills of lading for the delivery thereof, in deposit or pledge, from any consignee or consignees thereof; but in that case they shall acquire no further or other right, title, or interest, in or upon the said goods, &c. or any bill of lading for the delivery thereof, than was possessed, or could or might have been enforced by the said consignee or consignees at the time of such deposit or pledge as a security as aforesaid. § 2.

Nothing shall deprive or prevent the true owner or proprietor of such goods, wares, and merchandize from demanding and recovering the same from his, her, or their factor or agent, before the same shall have been so deposited or pledged, or from the assignee or assignees of such factors or agents in the event of their bankruptcy; nor to prevent any such owner or proprietor from demanding or recovering from any person or persons, or of or from the assignees of any person or persons, or of or from any body or bodies politic or corporate, such goods, wares, or merchandize so consigned, deposited, or pledged, upon repayment of the money, or on restoration of the negotiated security, or on payment of a sum of money equal to the amount of such security; nor to prevent them from recovering any balance or sum of money remaining in his, her, or their hands, as the produce of the sale of such goods, wares, or merchandize, after deducting thereout the amount of the money or negotiable security or securities so advanced or given upon the security thereof as aforesaid: provided always, that in case of bankruptcy of such factor or agent, the owner of the goods so pledged and redeemed as aforesaid shall be held to have discharged *pro tanto* the debt due by him to the bankrupt's estate. § 3.

BOOK IV.

OF THE RIGHTS OF THINGS.

CHAPTER I.

Of Lands, Tenements, and Hereditaments.

HAVING treated at large of the *jura personarum*, or such rights and duties as are annexed to the persons of men; our next inquiry will be the *jura rerum*, or those rights which a man may acquire in and to such external things as are unconnected with his person.

According to Blackstone, the objects of property are *things*, as contradistinguished from *persons*: and things are distributed into two kinds; things real, and things personal. Things *real* are such as are permanent, fixed, and immoveable, which cannot be carried out of their place, as lands and tenements; things *personal* are goods, money, and other moveables.

Things real are usually said to consist in lands, tenements, or hereditaments.

LAND

Comprehends all things of a permanent, substantial nature.

TENEMENT,

In its original, proper, and legal sense, signifies every thing that may be *holden*, provided it be of a permanent nature; whether it be of a substantial and sensible, or of an unsubstantial and ideal kind. Thus, *liberum tenementum*, frank tenement, or freehold, is applicable not only to lands and other solid objects, but also to offices, rents, commons, and the like: and as lands and houses are tenements, so is an advowson a tenement; and a franchise, an office, a right of common, a peerage, or other property of the like unsubstantial kind, are all of them, legally speaking, tenements. But an *hereditament* is by much the largest and most comprehensive expression; for it includes not only lands and tenements, but whatsoever may be *inherited*, be it corporeal or incorporeal, real, personal, or mixed. Thus, an heir-loom, or im-

plement of furniture, which by custom descends to the heir together with a house, is neither land nor tenement, but a mere moveable; yet, being inheritable, is comprised under the general word hereditament: and so a condition, the benefit of which may descend to a man from his ancestor, is also an hereditament.

HEREDITAMENTS

Are of two kinds, corporeal and incorporeal. *Corporeal* consist of such as affect the senses, such as may be seen and handled by the body; *incorporeal* are not the object of sensation, can neither be seen nor handled, are creatures of the mind, and exist only in contemplation.

Corporeal hereditaments consist wholly of substantial and permanent objects: all of which may be comprehended under the general denomination of *land* only. For *land* comprehends, in its legal signification, any ground, soil, or earth whatsoever; as arable, meadows, pastures, woods, moors, waters, marshes, furzes, and heath. It legally includes also all castles, houses, and other buildings; for they consist of two things, land, which is the foundation, and the structure thereupon; so that if I convey the land or ground, the structure or building passeth therewith. It is observable, that water is here mentioned as a species of land, which may seem a kind of solecism, but such is the language of the law; and therefore I cannot bring an action to recover possession of a pool or other piece of water by the name of water only, either by calculating its capacity, as for so many cubical yards, or by superficial measure, for twenty acres of water, or by general description, as for a pond, a watercourse, or a rivulet; but I must bring my action for the land that lies at the bottom, and must call it twenty acres of *land covered with water*. For water is a moveable wandering thing, and must of necessity continue common by the law of nature, so that I can only have a temporary, transient, usufructuary property therein; wherefore, if a body of water run out of my pond into another man's, I have no right to reclaim it. But the land which that water covers is permanent, fixed, and immoveable; and therefore in this I may have a certain, substantial property, of which the law will take notice, and not of the other.

Land hath also, in its legal signification, an indefinite extent upwards as well as downwards. Therefore no man may erect any building, or the like, to overhang another's land; and downwards, whatever is in a direct line between the surface of any land and the centre of the earth belongs to the owner of the surface. So that the word *land* includes not only the face of the earth, but every thing under it or over it. And therefore if a man grant all his lands, he thereby grants all his mines of metal and other fossils, his woods, his waters, and his houses, as well as his fields and meadows.

CHAPTER II.

Of Incorporeal Hereditaments.

INCORPOREAL hereditaments are principally of ten sorts; advowsons, tithes, commons, ways, offices, dignities, franchises, corodies or pensions, annuities, rents.

ADVOWSON

Is the right of presentation to a church or ecclesiastical benefice.

Advowsons are either advowsons appendant, or advowsons in gross. Lords of manors being originally the only founders, and of course the only patrons of churches, the right of patronage or presentation, so long as it continues annexed to the possession of the manor, as some have done from the foundation of the church to this day, is called an advowson *appendant*: and it will pass, or be conveyed, together with the manor as incident and appendant thereto, by the grant of the manor only, without adding any other words. But where the property of the advowson has been once separated from the property of the manor by legal conveyance, it is called an advowson *in gross*, or at large, and never can be appendant any more; but it is for the future annexed to the person of its owner, and not to its manor or lands.

Advowsons are also either presentative, collative, or donative. An advowson *presentative* is where the patron hath a right of presentation to the bishop or ordinary, and moreover to demand of him to institute his clerk, if he finds him canonically qualified; and this is the most usual advowson. An advowson *collative* is where the bishop and patron are one and the same person; in which case the bishop cannot present to himself; but he does by the one act of collation, or conferring the benefice, the whole that is done in common cases by both presentation and institution. An advowson *donative* is when the king, or any subject by his licence, doth found a church or chapel, and ordains that it shall be merely in the gift or disposal of the patron, subject to his visitation only, and not to that of the ordinary; and vested absolutely in the clerk by the patron's deed of donation, without presentation, institution, or induction.

TITHES.

Tithes are defined to be the tenth part of the increase yearly arising and renewing from the profits of lands, and stock upon lands, and the personal industry of the inhabitants. The first species being usually called *predial*, are of corn, grass, hops, and

wood; the second *mixed*, as of wool, milk, pigs, &c. consisting of natural products, but nurtured and preserved in part by the care of man; and of these the tenth must be paid in gross: the third *personal*, as of manual occupations, trades, fisheries, and the like; and of these only the tenth part of the clear gains and profits is due.

In general, tithes are to be paid for every thing that yields an annual increase, as corn, hay, fruit, cattle, poultry, and the like: but not for any thing that is of the substance of the earth, or is not of annual increase, as stone, lime, chalk, and the like; nor for creatures that are of a wild nature, or *feræ naturæ*, as deer, hawks, &c. whose increase, so as to profit the owner, is not annual, but casual.

Persons may be exempted from tithes, either in part or totally; first, by a real composition, or secondly, by custom or prescription.

First, by a *real composition*; which is, when an agreement is made between the owner of lands and the parson or vicar, with the consent of the ordinary and the patron, that such lands shall for the future be discharged from payment of tithes, by reason of some land, or other real recompence, given to the parson in lieu and satisfaction thereof. But the disabling statute, 13 Eliz. c. 10. prevents, among other spiritual persons, all parsons and vicars from making any conveyances of the estates of their churches, other than for three lives or twenty-one years. So that, by virtue of this statute, no real composition made since the 13 Eliz. is good for any longer term than three lives, or twenty-one years, though made by consent of the patron and ordinary.

Such a composition made since the 13 Eliz. though confirmed by a decree of the Court of Chancery, is now binding upon the succeeding incumbent.

A real composition cannot now be established without production of the deed by which it was created, or proof that it once actually existed, if it cannot now be found.

A parson or vicar may make a lease to bind himself for three lives or twenty-one years; but at his death the lease becomes entirely void, and does not in any degree affect his successor.

With regard to compositions entered into between the tithe-owner and any parishioner, for the latter to retain the tithes of his own estate, it has been decided, that they are analogous to leases from year to year between landlord and tenant; and if they are paid without, or beyond an agreement for a specific time, they cannot be put an end to without six months' notice before the time of payment; and the parishioner may avail himself of the defect of notice, at the same time that he controverts the right of the incumbent to receive tithes in kind; an objection not permitted to a tenant who denies the right of his landlord.

Secondly, a discharge by *custom or prescription* is where, time out of mind, such persons or such lands have been either partially or totally discharged from the payment of tithes. This cus-

tom or prescription is either *de modo decimandi*, or *de non decimando*.

A *modus decimandi*, commonly called by the simple name of a *modus* only, is where there is by custom a particular manner of tithing allowed, different from the general law of taking tithes in kind. This is sometimes a pecuniary compensation, as two-pence an acre for the tithe of land; sometimes it is a compensation in work and labour, as that the parson shall have only the twelfth cock of hay, and not the tenth, in consideration of the owner's making it for him; sometimes, in lieu of a large quantity of crude or imperfect tithe, the parson shall have a less quantity when arrived to greater maturity, as a couple of fowls in lieu of tithe eggs.

To make a good and sufficient *modus*, the following rules must be observed. It must be *certain* and *invariable*: for payment of different sums will prove it to be no *modus*, that is, no original real composition; because that must have been one and the same from its first original to the present time. The thing given in lieu of tithes must be beneficial to the *parson*, and not for the benefit of *third persons*. It must be something *different* from the thing compounded for: one load of hay, in lieu of *all* tithe hay, is no good *modus*; for no parson would *bonâ fide* make a composition to receive less than his due in the same species of tithe.

One cannot be discharged from payment of one species of tithe, by paying a *modus* for another. Thus, a *modus* of 1*d.* for every *milch* cow will discharge the tithe of *milch* kine, but not of *barren* cattle. The recompence must be in its nature as durable as the tithes discharged by it, that is, an inheritance certain; and therefore a *modus*, that every *inhabitant* of a house shall pay 4*d.* a year in lieu of the owner's tithes is no good *modus*.

The *modus* must not be too large, which is called a *rank modus*; as, if the real value of the tithes be 60*l.* per annum, and a *modus* is suggested of 40*l.* this *modus* will not be established, though one of 40*s.* might have been valid. The doctrine of *rankness* in a *modus* is a mere rule of evidence drawn from the improbability of the fact, and not a rule of law. For, in these cases of prescriptive or customary *moduses*, it is supposed that an original real composition was anciently made; which being lost by length of time, the immemorial usage is admitted as evidence to shew that it did once exist, and that from thence such usage was derived. Time of memory hath been ascertained to commence from the beginning of the reign of Richard I.; and any custom may be destroyed by evidence of non-existence in any part of the long period from that time to the present: wherefore, as this real composition is supposed to have been an equitable contract, or the full value of the tithes at the time of making it, if the *modus* so set up is so rank and large as that it beyond dispute exceeds the value of the tithes in the time of Richard the First, this *modus* is (in point of evidence) *felo de se*, and destroys itself.

A prescription *de non decimando* is a claim to be entirely discharged of tithes, and to pay no compensation in lieu of them.—

Thus the king, by his prerogative, is discharged from all tithes. So a vicar shall pay no tithes to the rector, nor the rector to the vicar. But these *personal* privileges (not arising from or being annexed to the land) are personally confined to both the king and the clergy; for their tenant or lessee shall pay tithes, though in their own occupation their lands are not generally tithable.

By 31 Hen. VIII. c. 13. all persons who should come to the possession of the lands of any abbey then dissolved should hold them free and discharged of tithes in as large and ample a manner as the abbey themselves formerly held them.

Commons.—Common, or right of common, appears from its very definition to be an incorporeal hereditament; being a profit which a man hath in the land of another,—as to feed his beasts, to catch fish, to dig turf, to cut wood, or the like. And hence common is chiefly of four sorts; common of pasture, of piscary, of turbary, and of estovers.

Common of pasture is a right of feeding one's beast on another's land. This kind of common is either appendant, appurtenant, because of vicinage, or in gross.

Common *appendant* is a right belonging to the owners or occupiers of arable land to put commonable beasts upon the lord's waste, and upon the lands of other persons within the same manor. Common beasts are either beasts of the plough, or such as manure the ground.

Common *appurtenant* ariseth from no connexion of tenure, nor from any absolute necessity, but may be annexed to lands in other lordships, or extend to other beasts besides such as are generally commonable; as hogs, goats, or the like, which neither plough nor manure the ground.

Common *because of vicinage*, or neighbourhood, is where the inhabitants of two townships which lie contiguous to each other have usually intercommoned with one another; the beasts of the one straying mutually into the other's fields, without any molestation from either.

Common *in gross*, or at large, is such as is neither appendant nor appurtenant to land, but is annexed a man's person, being granted to him and his heirs by deed; or it may be claimed by prescriptive right, as by a parson of a church, or the like corporation sole.

All these species of pasturable common may be and usually are limited as to number and time; but there are also commons without stint, and which last all the year. By the statute of Merton, and other subsequent statutes, the lord of a manor may inclose so much of the waste as he pleases for tillage or wood-ground, provided he leave common sufficient for such as are entitled thereto. This inclosure, when justifiable, is called in law "approving," an ancient expression signifying the same as "improving." Any person who is seised in fee of part of a waste may approve, besides the lord of the manor, provided he leaves a sufficiency of common for the tenants of the manor. The lord hath the sole interest in the soil; but the interest of the lord and commoner in the com-

mons are looked upon in law as mutual. They may both bring actions for damage, either against strangers or each other; the lord for the public injury, and each commoner for his private damage.

Common of piscary is a liberty of fishing in another man's water; as *common of turbary* is a liberty of digging turf upon another's ground. There is also a common of digging for coals, minerals, stones, and the like. All these bear a resemblance to common of pasture in many respects, though in one point they go much further; common of pasture being only a right of feeding on the herbage and vesture of the soil, which renews annually; but common of turbary, and those aforementioned, are a right of carrying away the very soil itself.

Common of estovers, or *estouviers*, that is, *necessaries*, is a liberty of taking necessary wood for the use or furniture of a house or farm from off another's estate: and therefore house-bote is a sufficient allowance of wood to repair, or to burn in the house, which latter is sometimes called fire-bote; plough-bote and cart-bote are wood to be employed in making and repairing all instruments of husbandry; and hay-bote, or hedge-bote, is wood for repairing of hays, hedges, or fences.

Ways.—A fourth species of incorporeal hereditaments is that of *ways*; or the right of going over another man's ground. This may be grounded on a special permission. A way may be also by prescription; as if all the inhabitants of such a hamlet, or all the owners and occupiers of such a farm, have immemorially used to cross such a ground for such a particular purpose; for this immemorial usage supposes an original grant, whereby a right of way thus appurtenant to land or houses may clearly be created.

Offices, which are a right to exercise a public or private employment, and to take the fees and emoluments thereunto belonging, are also incorporeal hereditaments, whether public, as those of magistrates; or private, as of bailiffs, receivers, and the like. By the 5 & 6 Edw. VI. c. 16. no public office (a few only excepted) shall be sold under pain of disability to dispose of or hold it; and if two offices are incompatible, by the acceptance of the latter the first is relinquished and vacant, even if it should be a superior office.

Dignities bear a near relation to offices, and are a species of incorporeal hereditaments, wherein a man may have a property or estate.

Franchises are another species. *Franchise* and *liberty* are used as synonymous terms; and their definition is, a royal privilege, or branch of the king's prerogative, subsisting in the hands of a subject.

Corodies are a right of sustenance, or to receive certain allotments of victual and provision for one's maintenance; in lieu of which (especially when due from ecclesiastical persons) a pension or sum of money is sometimes substituted.

Annuities are much of the same nature. By 53 Geo. III. c. 141. every annuity and rent-charge granted for one or more life or lives, or for any term of years, or greater estate determinable on one or

more life or lives, is to be enrolled in the Court of Chancery, within thirty days after the execution thereof, and the names of parties beneficially interested are to be stated in every deed, bond, instrument, or other assurance, whereby any annuity or rent-charge is granted.

By the 5th, 6th, and 7th sections of the same act, provision is made for parties to obtain copies of deeds or instruments securing annuities, and pointing out in what cases proceedings against the grantor of an annuity may stayed.

Contracts for the purpose of annuities by persons under age are declared void; and it is enacted, that if any person shall, either in person, by letter, agent, or otherwise howsoever, procure, engage, solicit, or ask any person, being under the age of twenty-one years, to grant or attempt to grant any annuity or rent-charge, or to execute any bond, deed, or other instrument for securing the same, or shall advance or procure or treat for any money to be advanced to any person under the age of twenty-one years, upon consideration of any annuity or rent-charge, to be secured or granted by such infant after he or she shall have attained his or her age of twenty-one years, or shall induce, solicit, or procure any infant, upon any treaty or transaction for money advanced or to be advanced, to make oath, or to give his or her word of honour or solemn promise, that he or she will not plead infancy, or make any other defence against the demand of any such annuity or rent-charge, or the repayment of the money advanced to him or her when under age, or that when he or she comes of age, he or she will confirm or ratify, or in any way substantiate such annuity or rent-charge, every such person shall be guilty of a misdemeanor, and shall be liable to be punished by fine, imprisonment, or other corporal punishment.

And it is further enacted, that every solicitor, scrivener, broker, or other person, who shall ask, demand, accept, or receive, directly or indirectly, any sum or sums of money, or any other kind of gratuity or reward, for soliciting or procuring the loan, and for the brokerage of any money that shall be actually and *bonâ fide* advanced and paid as and for the price or consideration of any such annuity or rent-charge, over and above the sum of 10*s.* for every 100*l.* so actually and *bonâ fide* advanced and paid, shall be deemed and adjudged guilty of a misdemeanor, and be liable to be punished by fine and imprisonment, or one of them, at the discretion of the court. § 9.

This act is not to extend to Scotland or Ireland, nor to annuities granted by will or by marriage settlement, or for the advancement of a child, nor to any annuity or rent-charge secured upon freehold or copyhold or customary lands in Great Britain or Ireland, or in any of his majesty's possessions beyond the seas, of equal or greater annual value than the said annuity, over and above any other annuity, and the interest of any principal sum charged or secured thereon, of which the grantee had notice at the time of the grant, whereof the grantor is seised in fee-simple or fee-tail, in possession, or the fee-simple whereof in possession the grantor is enabled to

charge at the time of the grant, or secured by the actual transfer of stock in any of the public funds, the dividends whereof are of equal or greater annual value than the said annuity; nor to any voluntary annuity or rent-charge granted without regard to pecuniary consideration or money's worth; nor to any annuity or rent-charge granted by any body corporate, or under any authority or trust created by act of parliament. § 10.

Doubts having arisen respecting the construction of the above act, it is enacted by the 3 Geo. IV. c. 92. that with respect to so much of the memorials required by the said act to be enrolled as relates to any description of the witness or witnesses to any deed, instrument, or assurance; no further or other description of the subscribing witness or witnesses to any deed, bond, instrument, or other assurance, whereby any annuity or rent charge is or may be granted, is required in the memorial thereof, besides the names of all such witnesses; and so the said act shall be deemed, construed, and taken. § 1.

And doubts having also arisen, whether under the said act the omission to enrol a memorial of any one of the assurances for securing any annuity or rent-charge does not vitiate the whole transaction, notwithstanding the enrolment of a memorial of another deed, bond, instrument, or other assurance granting the same; and it is also expedient to remove such doubts: it is further enacted and declared, that every deed, bond, instrument, or other insurance granting any annuity or rent charge, and of which a memorial shall have been or shall be duly enrolled pursuant to the said act, notwithstanding the omission to enrol any other deed, bond, instrument, or assurance for securing such annuity or rent charge, shall be valid and effectual, according to the intent, meaning, and true effect thereof, notwithstanding a memorial of any other deed, instrument, or assurance for securing the same annuity shall not have been duly enrolled pursuant to the said act. § 2.

But nothing herein contained shall extend to give any other force or validity to any deed, bond, instrument, or other assurance, of which a memorial shall have been duly enrolled as aforesaid, than such deed, bond, instrument, or other assurance would have had, if any deed, bond, instrument, or other assurance for securing the same annuity, of which a memorial shall not have been duly enrolled, had never been executed. § 3.

And this act shall not extend or be construed to extend to revive or give effect to any deed, bond, instrument, or other assurance, whereby any annuity or rent charge hath been already granted, so far as the same hath been adjudged, declared, treated, or deemed void by any judgment, decree, action, suit, or proceeding at law or in equity, or by any acts or deeds of the parties thereto, or by any other legal or equitable means whatsoever: nor shall this act affect or prejudice any suit or proceeding at law or in equity, commenced on or before the 31st of May, 1822, and now depending, upon the ground of an alleged defect in the memorial thereof, in not describing the witnesses thereto otherwise than by his, her, or

their name or names, for avoiding any such deed, bond, instrument, or other assurance. § 4.

Rents.—Rents are the last species of incorporeal hereditaments. The word *rent*, or *render*, signifies a compensation or return, and is defined to be a certain profit, issuing yearly out of lands and tenements corporeal. It must be a profit: yet there is no occasion for it to be, as it usually is, a sum of money; for spurs, capons, horses, corn, and other matters, may be rendered, and frequently are rendered, by way of rent. It may also consist in services, or manual operations. This profit must also be *certain*, or that which may be reduced to a certainty by either party. It must also issue *yearly*; though there is no occasion for it to issue every successive year, but it may be reserved every second, third, or fourth year.

It must issue out of the thing granted, and not be part of the land or thing itself; wherein it differs from an exception in the grant, which is always of part of the thing granted. It must, lastly, issue out of lands and tenements corporeal; that is, from some inheritance whereunto the owner or grantee of the rent may have recourse to distrain. Therefore a rent cannot be reserved out of an advowson, a common, an office, a franchise, or the like. But a grant of such annuity or sum may operate as a personal contract, and oblige the grantee to pay the money reserved, or subject him to an action of debt, though it doth not affect the inheritance, and is no legal rent in contemplation of law.

There are at common law three manner of rents; rent-service, rent-charge, and rent-seck. *Rent-service* is so called, because it hath some corporeal service incident to it; as, at the least, fealty, or the feudal oath of fidelity. For, if a tenant hold his land by fealty, and ten shillings rent; or by the service of ploughing the lord's land, and five shillings rent; these pecuniary rents, being connected with personal services, are therefore called rent-service. And for these, in case they be behind or in arrear at the day appointed, the lord may distrain of common right, without reserving any special power of distress; provided he hath in himself the reversion or future estate of the lands and tenements, after the lease or particular estate of the lessee or grantee is expired.

A *rent-charge* is where the owner of the rent hath no further interest or reversion expectant on the land; as, where a man by deed maketh over to others his whole estate in fee-simple, with a certain rent payable thereout, and adds to the deed a covenant or clause of distress, that if the rent be in arrear or behind, it shall be lawful to distrain for the same. In this case, the land is liable to the distress, not of common right, but by virtue of the clause in the deed; and therefore it is called a *rent-charge*, because in this manner the land is charged with a distress for the payment of it. *Rent-seck*, or barren rent, is in effect nothing more than a rent reserved by deed, but without any clause of distress.

There are also other species of rents, which are reducible to these three. Rents of *assize* are the certain established rents of the freeholders and ancient copyholders of a manor, which cannot be departed from or varied; those of the freeholders are frequently

called *chief* rents: and both sorts are indifferently denominated *quit* rents, because thereby the tenant goes quit and free of all other services. *Rack* rent is only a rent of the full value of the tenement, or near it. A *fee-farm* rent is a rent-charge issuing out of an estate in fee, of at least one-fourth of the value of the lands at the time of its reversion.

CHAPTER III.

Of Tenures.

ALMOST all the real property of England is supposed to be granted by, dependent upon, and holden of some superior lord, by and in consideration of certain services to be rendered to the lord by the tenant or possessor of this property. The thing holden is therefore styled a *tenement*, the possessors thereof *tenants*, and the manner of their possession a *tenure*.

Socage.—The free lands of England are now held by socage, which in its most general and extensive signification denotes a tenure by any certain and determinate service. This service must be certain, in order to denominate it socage; as, to hold by fealty and 20s. rent; or, by homage, fealty, and 20s. rent; or, by homage and fealty, without rent; or, by fealty and certain corporeal service, as ploughing the lord's land for three days; or, by fealty only, without any other service.

Grand Sergeanty.—By the 12 Car. II. grand sergeanty is not itself totally abolished, but only the slavish appendages belonging to it; for the honorary services (such as carrying the king's sword or banner, officiating as his butler, carver, &c. at the coronation) are still reserved.

Petit Sergeanty bears a great resemblance to grand sergeanty; for as the one is a personal service, so the other is a rent or render, both tending to some purpose relative to the king's person.

Tenure in burgage is where the king or other person is lord of an ancient borough, in which the tenements are held by a rent certain. It is indeed only a kind of town socage, as common socage, by which other lands are holden, is usually of a rural nature. A borough is usually distinguished from other towns by the right of sending members to parliament; and where the right of election is by burgage tenure, that alone is a proof of the antiquity of the borough. Tenure in burgage therefore, or burgage tenure, is where houses or lands, which were formerly the site of houses in an ancient borough, are held of some lord in common socage, by a certain established rent.

Of tenure in gavelkind.—The distinguishing properties of this tenure are various; some of the principal are these: the tenant is of age sufficient to aliene his estate by feoffment at the age of fifteen; the estate does not escheat in case of an attainder and execution for felony, their maxim being, "the father to the bough, the son to the plough;" in most places he had power of devising

lands by will, before the statute for that purpose was made; and the lands descend, not to the eldest, youngest, or any one son only, but to all the sons together.

Copyholds.—Copyhold tenures, as Sir Edward Coke observes, although very meanly descended, yet come of an ancient house; for copyholders were in truth no other than villains, who, by a long series of immemorial encroachments on the lord, have at last established a customary right to those estates, which before were held absolutely at the lord's will.

Two main principles are held to be the supporters of the copyhold tenure; *viz.* That the lands are parcel of, and situate within that manor under which it is held: that they have been demised, or demisable, by copy of court roll immemorially.

In some manors, where the custom hath been to permit the heir to succeed the ancestor in his tenure, the estates are styled copyholds of inheritance; in others, where the lords have been more vigilant to maintain their rights, they remain copyholds for life only: for the custom of the manor has in both cases so far superseded the will of the lord, that, provided the services be performed or stipulated for by fealty, he cannot, in the first instance, refuse to admit the heir of his tenant upon his death; nor, in the second, can he remove his present tenant so long as he lives, though he holds nominally by the precarious tenure of his lord's will.

The fruits and appendages of a copyhold tenure, that it hath in common with free tenures, are fealty, services (as well in rents as otherwise), reliefs, and escheats. The two latter belong only to copyholds of inheritance; the former, to those for life also. But, besides these, copyholds have also heriots, wardship, and fines.

Heriots are a render of the best beast or other good (as the custom may be) to the lord on the death of the tenant. These are incident to both species of copyhold; but wardship and fines to those of inheritance only.

Wardship, in copyhold estates, partakes both of that in chivalry and that in socage. Like that in chivalry, the lord is the legal guardian, who usually assigns some relation of the infant tenant to act in his stead; and he, like the guardian in socage, is accountable to his ward for the profits.

Of *fines*, some are in the nature of primer seisins, due on the death of each tenant; others are mere fines for the alienation of the lands: in some manors only one of these sorts can be demanded, in some both, and in others neither. They are sometimes arbitrary and at the will of the lord, sometimes fixed by custom: but even when arbitrary, the courts of law, in favour of the liberty of copyholds, have tied them down to be reasonable in their extent; otherwise they might amount to a disherison of the estate. No fine is therefore allowed to be taken upon descents and alienations (unless in particular circumstances) of more than two years improved value of the estate; and in ascertaining the yearly value, the quit rents must be deducted, but not the land-tax.

The fine may be recovered by the lord in an action of *assumpsit* : but he has no right to it till the admittance of the tenant. And the lord assesses the fine at his peril : if he assess it too high, he is not entitled to recover it. But the assessment need not be entered on the roll of the court.

CHAPTER IV.

Of Freehold Estates of Inheritance.

ESTATES of freehold are either estates of inheritance, or estates not of inheritance. The former are again divided into inheritances absolute or fee-simple, and the inheritances limited, one species of which we usually call fee-tail.

Tenant in *fee-simple* (or, as he is frequently styled, tenant in fee) is he that hath lands, tenements, or hereditaments, to hold to him and his heirs for ever, generally, absolutely, and simply ; without mentioning what heirs, but referring that to his own pleasure, or to the disposition of the law.

A *fee*, therefore, in general, signifies an estate of inheritance ; and when the term is used simply, without any other adjunct, or has the adjunct of *simple* annexed to it (as a fee, or a fee-simple), it is used in contradistinction to a fee conditional at the common law, or a fee-tail by the statute ; importing an absolute inheritance, clear of any condition, limitation, or restriction to particular heirs, but descendible to the heirs general, whether male or female, lineal or collateral.

The fee-simple or inheritance of lands and tenements is generally vested and resides in some person or other, though divers inferior estates may be carved out of it. As if one grant a lease for twenty-one years, or for one or two lives, the fee-simple remains vested in him and his heirs ; and, after the determination of those years or lives, the land reverts to the grantor, or his heirs, who shall hold it again in fee-simple. Yet sometimes the fee may be in *abeyance*, that is, in expectation, remembrance, and contemplation in law, there being no person in *esse* in whom it can vest and abide ; though the law considers it as always potentially existing, and ready to vest whenever a proper owner appears.

The word "*heirs*" is necessary in the grant or donation, in order to make a fee or inheritance. For if land be given to a man *for ever*, or to him *and his assigns for ever*, this vests in him but an estate for life. But this does not extend to devises by will, in which a more liberal construction is allowed ; and therefore by a devise to a man *for ever*, or to one *and his assigns for ever*, or

to one in *fee-simple*, the devisee hath an estate of inheritance; for the intention of the deviser is sufficiently plain from the words of perpetuity annexed, though he hath omitted the legal words of inheritance.

But if the devise be to a man *and his assigns*, without annexing words of perpetuity, there the devisee shall take only an estate for life, for it does not appear that the deviser intended any more. But it is not necessary to use any words of perpetuity in a devise, in order to give a fee-simple, where it appears to be the intention of the testator to dispose of all his interest in an estate, and that is implied from the word *estate* alone: as, if a testator gives to Richard his estate or estates in or at Dale, though neither heirs, assigns, or any other word, is annexed to Richard's name, yet he takes an estate in fee-simple. So also where lands are given to Richard, charged with the payment of a specific sum, and which is not to be raised out of the rents and profits, such a devise, without words of perpetuity, will carry a fee-simple; for otherwise the devisee might be a loser, by dying before he was repaid the sum charged upon the estate.

And where an estate is given generally, without words being added, which would create a fee or an estate tail, and it is charged with the payment of annuities, the devisee takes a fee; but that is not the case where an estate tail is given to the devisee. But where a testator leaves all his hereditaments to A, A takes only an estate for life.

A fee also will not pass by general introductory words in a will, by which the testator declares his intention to dispose of all his estate both real and personal, if there be not afterwards in the will some specific devise for that purpose. But where such subsequent devise is in some degree ambiguous, then the introductory words may have some effect, as indicative of the intention of the testator.

Neither does the rule above-mentioned extend to fines or recoveries considered as a species of conveyance; for thereby an estate in fee passes by act and operation of law without the word "heirs;" as it does also, for particular reasons, by certain other methods of conveyance, which have a relation to a former grant or estate, wherein the word "heirs" is expressed.

In grants of lands to sole corporations and their successors, the word "successors" supplies the place of "heirs;" for as heirs take from the ancestor, so doth the successor from the predecessor. Nay, in a grant to a bishop or other sole spiritual corporation in *frankalmoign*, the word "*frankalmoign*" supplies the place of "successors," as the word "successors" supplies the place of "heirs;" and in all these cases a fee-simple vests in such sole corporation. But in a grant of lands to a corporation aggregate, the word "successors" is not necessary, though usually inserted; for although such simple grant be strictly only an estate for life, yet as that corporation never dies, such estate for life is perpetual, or equivalent to a fee-simple, and therefore the law allows it to be one.

Lastly, in the case of the king, a fee-simple will vest in him, without the word "heirs" or "successors" in the grant; partly from prerogative royal, and partly from a reason similar to the last, because the king in judgment of law never dies. But the general rule is, that the word "heirs" is necessary to create an estate of inheritance.

We are next to consider limited fees, or such estates of inheritance as are clogged and confined with conditions or qualifications of any sort. And these we may divide into two sorts: *qualified* or *base* fees, and *fees conditional*, so called at the common law, and afterwards *fees tail*, in consequence of the statute *De donis*.

A *base* or *qualified fee* is such an one as hath a qualification subjoined thereto, and which must be determined whenever the qualification annexed to it is at an end. As in the case of a grant to A and his heirs, *tenants of the manor of Dale*; in this instance, whenever the heirs of A cease to be tenants of that manor, the grant is entirely defeated.

A *conditional fee*, at the common law, was a fee restrained to some particular heirs exclusive of others; as to the heirs of a man's body, by which only his lineal descendants were admitted, in exclusion of collateral heirs; or to the heirs male of his body, in exclusion both of collateral and lineal females also. It was called a conditional fee, by reason of the condition expressed or implied in the donation of it, that if the donee died without such particular heirs, the land should revert to the donor. For this was a condition annexed by law to all grants whatsoever, that, on failure of the heirs specified in the grant, the grant should be at an end, and the land return to its ancient proprietor.

With regard to the condition annexed to these fees by the common law, our ancestors held, that such a gift to a man and the heirs of his body was a gift upon condition that it should revert to the donor if the donee had no heirs of his body, but if he had it should then remain to the donee. They therefore called it a *fee simple on condition that he had issue*. Now we must observe, that when any condition is performed, it is thenceforth entirely gone, and the thing to which it was before annexed becomes absolute and wholly unconditional. So that as soon as the grantee had any issue born, his estate was supposed to become absolute by the performance of the condition, at least for these three purposes: first, to enable the tenant to aliene the land, and thereby to bar not only his own issue, but also the donor of his interest in the reversion; secondly, to subject him to forfeit it for treason, which he could not do till issue born, longer than for his own life, lest thereby the inheritance of the issue and reversion of the donor might have been defeated; thirdly, to empower him to charge the land with rents, commons, and certain other incumbrances, so as to bind his issue. And this was thought the more reasonable, because, by the birth of issue, the possibility of the donor's reversion was rendered more distant and precarious; and his in-

terest seems to have been the only one which the law, as it then stood, was solicitous to protect, without much regard to the right of succession intended to be vested in the issue. However, if the tenant did not in fact aliene the land, the course of descent was not altered by this performance of the condition; for if the issue had afterwards died, and then the tenant, or original grantee, had died without making any alienation, the land by the terms of the donation could descend to none but the heirs of his body, and therefore in default of them must have reverted to the donor. For which reason, in order to subject the lands to the ordinary course of descent, the donees of these conditional fees simple took care to aliene as soon as they had performed the condition by having issue, and afterwards repurchased the lands, which gave them a fee simple absolute, that would descend to the heirs general, according to the course of the common law. And thus stood the old law with regard to conditional fees; which things, says Sir Edward Coke, though they seem ancient, are yet necessary to be known, as well for the declaring how the common law stood in such cases, as for the sake of annuities, and such like inheritances, as are not within the statutes of entail, and therefore remain as at the common law.

The inconveniences which attended these limited and fettered inheritances were probably what induced the judges to give way to this subtille finesse of construction (for such undoubtedly it was), in order to shorten the duration of these conditional estates. But, on the other hand, the nobility, who were willing to perpetuate their possessions in their own families, to put a stop to this practice, procured the Statute of Westminster the second, commonly called the Statute *De donis conditionalibus*, to be made, which paid a greater regard to the private will and intentions of the donor than to the propriety of such intentions, or any public considerations whatsoever. This statute revived in some sort the ancient feudal restraints which were originally laid on alienations, by enacting, that from thenceforth the will of the donor be observed, and that the tenements so given (to a man and the heirs of his body) should at all events go to the issue, if there were any, or, if none, should revert to the donor.

Upon the construction of this act of parliament, the judges determined, that the donee had no longer a conditional fee-simple, which became absolute and at his own disposal the instant any issue was born; but they divided the estate into two parts, leaving in the donee a new kind of particular estate which they denominate a *fee tail*, and investing in the donor the ultimate fee simple of the land, expectant on the failure of issue; which expectant estate is what we now call a *reversion*.

We now come to consider what things may or may not be entailed under the statute *De donis*. *Tenements* is the only word used in the statute; and this Sir Edward Coke expounds to comprehend all corporeal hereditaments whatsoever; and also all incorporeal hereditaments which savour of the realty, that is,

which issue out of corporeal ones; or which concern, or are annexed to, or may be exercised within the same, as rents, estovers, commons, and the like. Also offices and dignities, which concern lands, or have relation to fixed and certain places, may be entailed. But mere personal chattels, which savour not at all of the realty, cannot be entailed. Neither can an office which merely relates to such personal chattels; nor an annuity which charges only the person, and not the lands of the grantor. But in these last, if granted to a man and the heirs of his body, the grantee hath still a fee conditional at common law, as before the statute; and by his alienation (after issue born) may bar the heir or reversioner. If an annuity is granted out of personal property to a man and the heirs of his body, it is a fee conditional at common law, and there can be no remainder or further limitation of it; and when the grantee has issue, he has the full power of alienation, and of barring the possibility of its reverting to the grantor by the extinction of his issue. But out of a term for years, or any personal chattel, except in the instance of an annuity, neither a fee conditional nor an estate tail can be created; for if they are granted or devised by such words as would convey an estate tail in real property, the grantee or devisee has the entire and absolute interest without having issue; and as soon as such an interest is vested in any one, all subsequent limitations of consequence become null and void.

An estate to a man and his heirs for another's life cannot be entailed; for this is strictly no estate of inheritance, and therefore not within the statute *De donis*. Neither can a copyhold estate be entailed by virtue of the statute; for that would tend to encroach upon and restrain the will of the lord: but, by the *special custom* of the manor, a copyhold may be limited to the heirs of the body; for here the custom ascertains and interprets the lord's will.

Next, as to the several *species* of estates tail, and how they are respectively created. Estates tail are either *general* or *special*. Tail general is where lands and tenements are given to one *and the heirs of his body begotten*; which is called tail general, because, how often soever such donee in tail be married, his issue in general by all and every such marriage is, in successive order, capable of inheriting the estate tail, *per formam doni*. Tenant in tail special is where the gift is restrained to certain heirs of the donee's body, and does not go to all of them in general. And this may happen several ways. We shall only instance one; as where lands and tenements are given to a man *and the heirs of his body on Mary his now wife to be begotten*: here no issue can inherit, but such special issue as is engendered between them two; not such as the husband may have by another wife; and therefore it is called special tail. And here we may observe, that the words of inheritance (to him and his heirs) give him an estate in fee; but they being heirs to be by him begotten, this makes it a fee tail; and the person being also limited on whom such heirs shall be begotten (*viz.* Mary his present wife), this makes it a fee-tail special.

Estates in general and special tail are further diversified by the distinction of sexes in such entails; for both of them may either be in tail male or tail female. As if land be given to a man *and the heirs male of his body begotten*, this is an estate in tail male general; but if to a man *and the heirs female of his body on his present wife begotten*, this is an estate in tail female special. And in case of an entail male, the heirs female shall never inherit, nor any derived from them; nor, *à converse*, the heirs male, in case of a gift in tail female. Thus, if a donee in tail male have a daughter, who dies leaving a son, such grandson in this case cannot inherit the estate tail, for he cannot deduce his descent wholly by heirs male. And as the heir male must convey his descent wholly by males, so must the heir female wholly by females. And therefore if a man have two estates tail, the one in tail male, and the other in tail female, and he have issue a daughter, which daughter have issue a son, this grandson can succeed to neither of the estates, for he cannot convey his descent wholly either in the male or female line.

As the word *heirs* is necessary to create a fee, so, in farther limitation of the strictness of the feodal donation, the word *body*, or some other words of procreation, are necessary to make it a fee tail, and ascertain to what heirs in particular the fee is limited. If therefore, either the words of inheritance or words of procreation be omitted, although the others are inserted in the grant, this will not make an estate tail. As if the grant be to a man *and the issue of his body*, to a man *and his seed*, to a man *and his children*, or *offspring*, all these are only estates for life, there wanting the words of inheritance, *his heirs*. So, on the other hand, a gift to a man *and his heirs male*, or *female*, is an estate in fee simple, and not in fee tail, for there are no words to ascertain the body out of which they shall issue. Indeed, in last wills and testaments, wherein greater indulgence is allowed, an estate tail may be created by a devise to a man *and his seed*, or to a man *and his heirs male*, or by other irregular modes of expression.

The incidents to a tenancy in tail, under the statute Westm. 2. are chiefly these; that a tenant in tail may commit waste on the estate tail, by felling timber, pulling down houses, or the like, without being impeached or called to account for the same; that the wife of the tenant in tail shall have her dower or thirds of the estate tail; that the husband of a female tenant in tail may be tenant by the courtesy of the estate tail; that an estate tail may be barred or destroyed by a fine, by a common recovery, or by lineal warranty descending with assets to the heir.

By the 26 Hen. VIII. c. 13. all estates of inheritance (under which general words estates tail were covertly included) are declared to be forfeited to the king upon any conviction of high treason.

Also, by the 32 Hen. VIII. c. 28. certain leases made by the tenants in tail, which do not tend to the prejudice of the issue, are allowed to be good in law, and to bind the issue in tail. And

the 32 Hen. VIII. c. 36. declares a fine duly levied by tenant in tail to be a complete bar to him and his heirs and all other persons claiming under such entail.

Lastly, by the 33 Hen. VIII. c. 39. all estates tail are rendered liable to be charged for payment of debts due to the king by record or special contract; as since, by the bankrupt laws, they are also subjected to be sold for the debts contracted by a bankrupt. And, by the construction put on the 43 Eliz. c. 4. an appointment by tenant in tail of the lands entailed to a charitable use, is good without fine or recovery.

CHAPTER V.

Of Freehold Estates for Life.

WE are next to discourse of such estates of freehold as are not of inheritance, but *for life* only. And of these estates for life, some are *conventional*, or expressly created by the act of the parties; others merely *legal*, or created by construction and operation of law.

Estates for life, expressly created by deed or grant (which alone are properly conventional), are, where a lease is made of lands or tenements to a man, to hold for the term of his own life, or for that of any other person, or for more lives than one; in any of which cases he is styled tenant for life; only when he holds the estate by the life of another he is usually called tenant *per autre vie*.

Estates for life may be created, not only by the express words before-mentioned, but also by a general grant, without defining or limiting any specific estate. As, if one grant to A.B. the manor of Dale, this makes him tenant for life; for though as there are no words of inheritance, or *heirs*, mentioned in the grant, it cannot be construed to be a fee, it shall, however, be construed to be as large an estate as the words of the donation will bear, and therefore an estate for life. Also such a grant at large, or a grant for term of life generally, shall be construed to be an estate for the life of the *grantor*, in case the grantor hath authority to make such grant; for an estate for a man's own life is more beneficial and of a higher nature than for any other life; and the rule of the law is, that all grants are to be taken most strongly against the grantor, unless in the case of the king.

Such estates for life will, generally speaking, endure as long as the life for which they are granted; but there are some estates for life which may determine, upon future contingencies, before the life for which they are created expires. As, if an estate be granted to a woman during her widowhood, or to a man until he be pro-

moted to a benefice; in these and similar cases, whenever the contingency happens, when the widow marries, or when the grantee obtains a benefice, the respective estates are absolutely determined and gone. Yet, while they subsist, they are reckoned estates for life; because, the time for which they will endure being uncertain, they may by possibility last for life, if the contingencies upon which they are to determine do not sooner happen.

The incidents to an estate for life are principally the following; which are applicable not only to that species of tenants for life which are expressly created by deed, but also to those which are created by act and operation of law:—

Every tenant for life, unless restrained by covenant or agreement, may, of common right, take upon the land demised to him reasonable estovers or botes; for he hath a right to the full enjoyment and use of the land, and all its profits, during his estate therein. But he is not permitted to cut down timber, or do other waste upon the premises; for the destruction of such things as are not the temporary profits of the tenement, is not necessary for the tenant's complete enjoyment of his estate, but tends to the permanent and lasting loss of the person entitled to the inheritance.

Tenant for life, or his representative, shall not be prejudiced by any sudden determination of his estate, because such a determination is contingent and uncertain. Therefore, if a tenant for his own life sow lands, and die before harvest, his executors shall have the emblements, or profits of the crop, to compensate for the labour and expence of tilling, manuring, and sowing the lands.

So it is also, if a man be tenant for the life of another, and *cestui qui vie* (or he on whose life the land is held) dies after the corn sown, the tenant *par autre vie* shall have the emblements. The same is also the rule, if a life estate be determined by the act of law. Therefore, if a lease be made to husband and wife during her coverture (which gives them a determinable estate for life), and the husband sows the land, and afterwards they are divorced *a vinculo matrimonii*, the husband shall have the emblements in this case; for the sentence of divorce is the act of law.

But if an estate for life be determined by the tenant's own act (as by forfeiture for waste committed, or if a tenant during widowhood thinks proper to marry), in these and similar cases, the tenants, having thus determined the estate by their own acts, shall not be entitled to take the emblements.

A third incident to estates for life relates to the under-tenants, or lessees. For they have the same, nay, greater indulgencies than the lessors, the original tenants for life. The same; for the law of estovers and emblements, with regard to the tenant for life, is also law with regard to his under-tenant, who represents him, and stands in his place: and greater; for in those cases

where a tenant for life shall not have the emblements; because the estate determines by his own act, the exception shall not reach his lessee, who is a third person. As in the case of a woman who holds *durante viduitate*, her taking a husband is her own act, and therefore deprives her of the emblements; but if she lease her estate to an under-tenant, who sows the land, and she then marries, this her act shall not deprive the tenant of his emblements, who is a stranger, and could not prevent her.

The next estate for life is of the legal kind; as contradistinguished from conventional; viz. that of *tenant in tail after possibility of issue extinct*. This happens where one is tenant in special tail, and a person from whose body the issue was to spring dies without issue, or having left issue, that issue becomes extinct; in either of these cases the surviving tenant in special tail becomes tenant in tail after possibility of issue extinct. As, where one has an estate to him and his heirs on the body of his present wife to be begotten, and the wife dies without issue; in this case the man has an estate tail, which cannot possibly descend to any one; and therefore the law makes use of this long periphrasis, as absolutely necessary to give an adequate idea of his estate.

This estate must be created by the act of God, that is, by the death of that person out of whose body the issue was to spring; for no limitation, conveyance, or other human act, can make it. For if land be given to a man and his wife, and the heirs of their two bodies begotten, and they are divorced *a vinculo matrimonii*, they shall neither of them have this estate, but be barely tenants for life, notwithstanding the inheritance once vested in them. A possibility of issue is always supposed to exist, in law, unless extinguished by the death of the parties; even though the donees be each of them an hundred years old.

This estate is of an amphibious nature, partaking partly of an estate tail, and partly of an estate for life. The tenant is, in truth, only tenant for life, but with many of the privileges of a tenant in tail; as, not to be punishable for waste, &c.: or, he is tenant in tail, with many of the restrictions of a tenant for life; as, to forfeit his estate if he alienes it in fee-simple; whereas such alienation by tenant in tail, though voidable by the issue, is no forfeiture of the estate to the reversioner, who is not concerned in interest till all possibility of issue be extinct. But, in general, the law looks upon this estate as equivalent to an estate for life only; and as such, will permit this tenant to exchange his estate with a tenant for life; which exchange can only be made of estates that are equal in nature.

Tenant by the courtesy of England is where a man marries a woman seised of an estate of inheritance, that is, of lands and tenements in fee-simple or fee-tail; and has by her issue, born alive, which was capable of inheriting her estate. In this case he shall, on the death of his wife, hold the lands for his life, as tenant by the courtesy of England.

There are four requisites necessary to make a tenancy by the

courtesy; marriage, seisin of the wife, issue, and death of the wife. The marriage must be canonical and legal. The seisin of the wife must be an actual seisin, or possession of the lands; not a bare right to possess, which is a seisin in law, but an actual possession, which is a seisin in deed. And therefore a man shall not be tenant by the courtesy of a remainder or reversion. But of some incorporeal hereditaments a man may be tenant by the courtesy, though there has been no actual seisin of the wife; as in case of advowson, where the church has not become void in the life-time of the wife, which a man may hold by the courtesy, because it is impossible ever to have actual seisin of it. If the wife be an idiot, the husband shall not be tenant by the courtesy of her lands: for the king by prerogative is entitled to them the instant she herself has any title; and since she could never be rightfully seised of the lands, and the husband's title depends entirely upon her seisin, the husband can have no title as tenant by the courtesy. The issue must be born alive. The issue also must be born during the life of the mother; for if the mother die in labour, and the Cæsarean operation is performed, the husband in this case shall not be tenant by the courtesy; because, at the instant of the mother's death, he was clearly not entitled, as having had no issue born, but the land descended to the child while he was yet in his mother's womb; and the estate being once so vested shall not afterwards be taken from him. In gavelkind lands, a husband may be tenant by the courtesy, without having any issue. But in general there must be issue born; and such issue as is also capable of inheriting the mother's estate. Therefore if a woman be tenant in tail *male*, and have only a *daughter* born, the husband is not thereby entitled to be tenant by the courtesy; because such issue female can never inherit the estate in tail male. And this seems to be the principal reason why the husband cannot be tenant by the courtesy of any lands of which the wife was not actually seised; because, in order to entitle himself to such estate, he must have begotten issue that may be heir to the wife; but no one, by the standing rule of law, can be heir to the ancestor, of any land whereof the ancestor was not actually seised; and therefore, as the husband hath never begotten any issue that can be heir to these lands, he shall not be tenant of them by the courtesy. The husband, by the birth of the child, becomes (as was before observed) tenant by the courtesy initiate, and may do many acts to charge the lands; but his estate is not consummate till the death of the wife, which is the fourth and last requisite to make a complete tenant by the courtesy.

DOWERS.

Tenant in dower is where the husband of a woman is seised of an estate of inheritance, and dies: in this case the wife shall have the third part of all the lands and tenements whereof he was seised at any time during the coverture, to hold to herself for the term of her natural life.

In treating of this estate, let us first consider, *who* may be endowed; secondly, of *what* she may be endowed; thirdly, the manner *how* she shall be endowed; and, fourthly, how dower may be *barred* or prevented.

Who may be endowed. She must be the actual wife of the party at the time of his decease. If she be divorced *a vinculo matrimonii*, she shall not be endowed. But a divorce *a mens et thoro* only doth not destroy the dower; no, not even for adultery itself by the common law. Yet now by the statute West. 2. If a woman voluntarily leave (which the law calls eloping from) her husband, and live with an adulterer, she shall lose her dower, unless her husband be voluntarily reconciled to her. The widows of traitors are barred of their dower (except in the case of certain modern treasons relating to the coin); but not the widows of felons. An alien also cannot be endowed, unless she be queen consort; for no alien is capable of holding lands. The wife must be above nine years old at her husband's death, otherwise she shall not be endowed.

We are next to inquire of *what* a wife may be endowed. And she is now by law entitled to be endowed of all lands and tenements of which her husband was seised in fee-simple or fee-tail at any time during the coverture, and of which any issue which she might have had, might by possibility have been heir. Therefore if a man seised in fee-simple have a son by his first wife, and after marries a second wife, she shall be endowed of his lands; for her issue might by possibility have been heir, on the death of the son by the former wife. But if there be a donee in special tail, who holds lands to him and the heirs of his body begotten on Jane his wife; though Jane may be endowed of these lands, yet if Jane dies, and he marries a second wife, the second wife shall never be endowed of the lands entailed; for no issue that she could have, could by any possibility inherit them. A seisin in law of the husband will be as effectual as a seisin in deed, in order to render the wife dowable; for it is not in the wife's power to bring the husband's title to an actual seisin, as it is in the husband's power to do with regard to the wife's lands; which is one reason why he shall not be tenant by the courtesy, but of such lands whereof the wife, or he himself in her right, was actually seised in deed. The seisin of the husband for a transitory instant only, when the same act which gives him the estate conveys it also out of him again (as where by a fine land is granted to a man, and he immediately renders it back by the same fine), such a seisin will not entitle the wife to dower; for the land was merely *in transitu*, and never rested in the husband, the grant and render being one continued act. But if the land abide in him for the interval of but a single moment, it seems that the wife shall be endowed thereof. And, in short, a widow may be endowed of all her husband's lands, tenements, and hereditaments, corporeal or incorporeal, under the restrictions before mentioned; unless there be some special reason to the contrary. Thus, a woman shall not be endowed of a castle, built for

defence of the realm; nor of a common without stint; for, as the heir would then have one portion of this common, and the widow another, and both without stint, the common would be doubly stocked. Copyhold estates are also not liable to dower, being only estates at the lord's will; unless by the special custom of the manor, in which case it is usually called the widow's free-bench. But, where dower is allowable, it matters not though the husband aliene the lands during the coverture; for he alienes them liable to dower.

Next, as to the *manner* in which a woman is to be endowed. There are now subsisting four species of dower. Dower by the *common law*, or that which is before described. Dower by *particular custom*; as that the wife should have half the husband's lands, or in some places the whole, and in some only a quarter. Dower *ad ostium ecclesiæ*; which is where tenant in fee-simple of full age, openly at the church door, and troth plighted between them, doth endow his wife with the whole, or such quantity as he shall please, of his lands, at the same time specifying and ascertaining the same; on which the wife, after the husband's death, may enter without further ceremony. Dower *ex assensu patris*; which is only a species of dower *ad ostium ecclesiæ*, made when the husband's father is alive, and the son, by his consent expressly given, endows his wife with parcel of his father's lands.

We proceed, therefore, to consider the method of endowment, or assigning dower. By *magna charta* a woman shall remain in her husband's capital mansion-house for forty days after his death, during which time her dower shall be assigned. The particular lands to be held in dower must be assigned by the heir of the husband, or his guardian. If the heir, or his guardian, do not assign her dower within the term of forty days, or do assign it unfairly, she has her remedy at law, and the sheriff is appointed to assign it. Or if the heir (being under age), or his guardian, assign more than she ought to have, it may be afterwards remedied by writ of *admeasurement* of dower. If the thing of which she is endowed be devisable, her dower must be set out by metes and bounds; but if it be indevisable, she must be endowed specially; as of the third presentation to a church, the third toll-dish of a mill, the third part of the profits of an office, the third sheaf of tithe, and the like.

A widow may be *barred* of her dower, not only by elopement, divorce, being an alien, the treason of her husband, and other disabilities before mentioned, but also by detaining the title deeds or evidences of the estate from the heir, until she restores them: and, by the statute of Gloucester, if a dowager aliene the land assigned her for dower, she forfeits it *ipso facto*, and the heir may recover it by action. A woman also may be barred of her dower by levying a fine, or suffering a recovery of the lands, during the coverture. But the most usual method of barring dowers is by jointures, as regulated by the 27 Hen. VIII. c. 10.

JOINTURES.

A jointure signifies a joint estate, limited to both husband and wife; but, in common acceptation, extends also to a sole estate, limited to the wife only. It is thus defined by Sir Edward Coke: "a competent livelihood of freehold for the wife, of lands and tenements; to take effect, in profit or possession, presently after the death of the husband, for the life of the wife at least." This description is framed from the purview of the statute 27 Hen. VIII. c. 10. before mentioned, commonly called the Statute of Uses. The jointure must take effect immediately on the death of the husband. It must be for her own life at least, and not *par autre vie*, or for any term of years, or other smaller estate. It must be made to herself, and to no other in trust for her. It must be made, and so in the deed particularly expressed to be, in satisfaction of her whole dower, and not of any particular part of it. If the jointure be made to her after marriage, she has her election, after her husband's death, as in dower *ad ostium ecclesiæ*, and may either accept it, or refuse it and betake herself to her dower at common law; for she was not capable of consenting to it during coverture. And where a devise is expressed to be given in lieu and satisfaction of dower, or where that is the clear and manifest intention of the testator, the wife shall not have both, but shall have her choice. But where the lands are devised, out of which the widow is entitled to dower, and the testator leaves her an annuity, she shall not be put to her election, unless it appears to have been the intention of the testator that she should not retain both.* And if, by any fraud or accident, a jointure made before marriage proves to be on a bad title, and the jointress is evicted, or turned out of possession, she shall then (by the provisions of the same statute) have her dower *pro tanto* at the common law.

It has been determined, that if a woman, who is under age at the time of marriage, agree to a jointure and settlement in bar of her dower and her distributive share of her husband's personal property in case he dies intestate, she cannot afterwards waive it, but is as much bound as if she were of age at the time of marriage. Lord Northington had decreed the contrary; but his decree was upon both points reversed.

There are some advantages attending tenants in dower that do not extend to jointresses; and so *vice versâ*, jointresses are in some respects more privileged than tenants in dower. Tenant in dower, by the old common law, is subject to no tolls or taxes; and her's is almost the only estate on which, when derived from the king's debtor, the king cannot distrain for his debt, if contracted during the coverture. But, on the other hand, a widow may enter at once, without any formal process, on her jointure land; as she also might have done on dower *ad ostium ecclesiæ*, which a jointure

* Lord Eldon has declared, that "the question in all these cases is, whether the testator meant to give away his wife's dower; which he could not do directly. For that it must be seen clearly, that he meant to dispose so, that if she should claim dower, it would disappoint the will. It must appear there is a repugnancy." 6 Ves. Junr. 616.

in many points resembles; and the resemblance was still greater while that species of dower continued in its primitive state: whereas no small trouble, and a very tedious method of proceeding, is necessary to compel a legal assignment of dower. And, what is more, though dower be forfeited by the treason of the husband, yet lands settled in jointure remain unimpeached to the widow. Wherefore Sir Edward Coke very justly gives it the preference, as being more sure and safe to the widow, than even dower *ad ostium ecclesie*, the most eligible species of any.

A jointure is not forfeited by the adultery of the wife, as dower is; and the Court of Chancery will decree against the husband a performance of marriage articles, though he alleges and proves that his wife lives separate from him in adultery.

CHAPTER VI.

Of Estates less than Freehold.

OF estates that are less than freehold there are three sorts; estates for years; estates at will; estates by sufferance.

ESTATES FOR YEARS.

An estate for years is a contract for the possession of lands or tenements for some determinate period: and it takes place where a man letteth them to another for the term of a certain number of years, agreed upon between the lessor and lessee, and the lessee enters thereon. If the lease be but for half a year, or a quarter, or any less time, this lessee is respected as a tenant for years, and is styled so in some legal proceedings; a year being the shortest term which the law in this case takes notice of.

Every estate which must expire at a period certain and prefixed, by whatever words created, is an estate for years. And therefore this estate is frequently called a *term*, because its duration or continuance is bounded, limited, and determined; for every such estate must have a certain beginning and a certain end. Therefore, if a man make a lease to another, for so many years as J. S. shall name, it is a good lease for years, for though it is at present uncertain, yet when J. S. hath named the years, it is then reduced to a certainty. If no day of commencement is named in the creation of this estate, it begins from the making or delivery of the lease. A lease for so many years as J. S. shall live, is void from the beginning; for it is neither certain, nor can ever be reduced to a certainty, during the continuance of the lease.

An estate for life, even if it be *par autre vie*, is a freehold; but an estate for a thousand years is only a chattel, and is reckoned part of the personal estate. Hence it follows, that a lease for years may be made to commence *in futuro*, though a lease for life

cannot. As if I grant lands to T, to hold from Michaelmas next for twenty years, this is good ; but to hold from Michaelmas next for the term of his natural life, is void ; for no estate of freehold can commence *in futuro*, because it cannot be created at common law without livery of seisin, or corporeal possession of the land, and corporeal possession cannot be given of an estate now, which is not to commence now but hereafter. And because no livery of seisin is necessary to a lease for years, such lessee is not said to be *seised*, or to have true legal seisin of the lands. Nor indeed does the bare lease vest any estate in the lessee, but only gives him a right of entry on the tenement, which right is called his interest in the term, *interesse termini* : but when he has actually so entered, and thereby accepted the grant, the estate is then, and not before, vested in him, and he is possessed, not properly of the land, but of the term of years, the possession or seisin of the land remaining still in him who hath the freehold. Thus the word *term* does not merely signify the term specified in the lease, but the estate also and interest that passes by that lease, and therefore the *term* may expire during the continuance of the *time*, as by surrender, forfeiture, and the like.

Tenant for term of years hath incident to and inseparable from his estate, unless by special agreement, the same estovers that tenant for life was entitled to ; that is to say, house-bote, fire-bote, plough-bote, and hay-bote.

With regard to emblements, or the profits of lands sowed by tenant for years, there is this difference between him and tenant for life, that where the term of tenant for years depends upon a certainty, as if he hold from Midsummer for ten years, and in the last year he sows a crop of corn, and it is not ripe and cut before Midsummer the end of his term, the landlord shall have it.

But where the lease for years depends upon an uncertainty, as upon the death of the lessor, being himself only tenant for life, or being a husband seised in right of his wife, or if the term of years be determined upon a life or lives, in all these cases the estate for years not being certainly to expire at a time foreknown, but merely by the act of God, the tenant or his executors shall have the emblements in the same manner that a tenant for life or his executors shall be entitled thereto. Not so, if it determine by the act of the party himself : as if tenant for years does any thing that amounts to a forfeiture ; in which case the emblements shall go to the lessor, and not the lessee, who hath determined his estate by his own default.

ESTATES AT WILL.

The second species of estates not freehold are estates at will. An estate at will is where lands and tenements are let by one man to another, to have and to hold at the will of the lessor, and the tenant by force of his lease obtains possession. Such tenant hath no certain indefeasible estate, nothing that can be assigned by him to any other : because the lessor may determine his will

and put him out whenever he pleases. But every estate at will is at the will of both parties, landlord and tenant; so that either of them may determine his will, and quit his connections with the other at his own pleasure. Yet this must be understood with some restriction; for if the tenant at will sows his lands, and the landlord, before the corn is ripe, or before it is reaped, puts him out, yet the tenant shall have the emblements, and free ingress, egress, and regress, to cut and carry away the profits. But it is otherwise where the tenant himself determines the will; for in this case the landlord shall have the profits of the land.

What act does or does not amount to a determination of the will on either side, has formerly been matter of great debate in our courts. But it is now settled, that (besides the express determination of the lessor's will, by declaring that the lessee shall hold no longer, which must either be made upon the land, or notice must be given to the lessee), the exertion of any act of ownership by the lessor, as entering upon the premises and cutting timber, taking a distress for rent and impounding thereon, or making a feoffment or lease for years of the land to commence immediately; any act of desertion by the lessee, as assigning his estate to another, or committing waste, which is an act inconsistent with such a tenure; or, which is *instar omnium*, the death or outlawry of either lessor or lessee, puts an end to or determines the estate at will.

COPYHOLD ESTATES.

There is one species of estates at will that deserves a more particular regard than any other, and that is, an estate held by copy of court-roll, or, as we usually call it, a copyhold estate. This was, in its original and foundation, nothing better than a mere estate at will. But the kindness and indulgence of successive lords of manors having permitted these estates to be enjoyed by the tenants and their heirs according to particular customs established in their respective districts, therefore, though they still are held at the will of the lord, and so are in general expressed in the court-rolls to be, yet that will is qualified, restrained, and limited, to be exerted according to the custom of the manor. This custom being suffered to grow up by the lord, is looked upon as the evidence and interpreter of his will; his will is no longer arbitrary and precarious, but fixed and ascertained by the custom to be the same (and no other) that has time out of mind been exercised and declared by his ancestors. A copyhold tenant is therefore now full as properly a tenant by the custom, as a tenant by will; the custom having arisen from a series of uniform wills.

Almost every copyhold tenant being therefore thus tenant at the will of the lord according to the custom of the manor, such tenant may have, so far as the custom warrants, any other of the estates or quantities of interest, which we have hitherto considered, and hold them united with this customary estate at will. A copyholder may, in many manors, be tenant in fee-simple, in fee-tail,

for life by the courtesy, in dower, for years, at sufferance, or on condition; subject, however, to be deprived of these estates upon the concurrence of those circumstances which the will of the lord, promulgated by immemorial custom, has declared to be a forfeiture or absolute determination of those interests; as, in some manors the want of issue male, in others the cutting down timber, the non-payment of a fine, and the like. Yet none of these interests amounts to freehold; for the freehold of the whole manor abides always in the lord only, who hath granted out the use and occupation, but not the corporeal seisin or true legal possession, of certain parcels thereof to these his customary tenants at will.

ESTATES AT SUFFERANCE.

An estate at sufferance is where one comes into possession of land by lawful title, but keeps it afterwards without any title at all. As, if a man take a lease for a year, and after a year is expired, continue to hold the premises without any fresh leave from the owner of the estate; or, if a man make a lease at will, and die, the estate at will is thereby determined; but if the tenant continue possession, he is tenant at sufferance. But no man can be tenant at sufferance against the king, to whom no *laches* or neglect in not entering and ousting the tenant is ever imputed by law, but his tenant so holding over is considered as an absolute intruder. But, in the case of a subject, this estate may be destroyed whenever the true owner shall make an actual entry on the lands, and oust the tenant; for before entry he cannot maintain an action of trespass against the tenant by sufferance, as he might against a stranger; and the reason is, because the tenant being once in by lawful title, the law (which presumes no wrong in any man) will suppose him to continue upon a title equally lawful, unless the owner of the land, by some public and avowed act, such as entry, will declare his continuance to be wrongful.

Thus stands the law with regard to tenants by sufferance; and landlords are obliged in these cases to make formal entries upon their lands, and recover possession by the legal process of ejectment; and at the utmost, by the common law, the tenant was bound to account for the profits of the land so by him detained. But now, by the 4 Geo. II. c. 28. in case any tenant for life or years, or other person claiming under or by collusion with such tenant shall wilfully hold over after the determination of the term, and demand made; and notice in writing given by him to whom the remainder or reversion of the premises shall belong, for delivering the possession thereof, such person so holding over or keeping the other out of possession, shall pay for the time he detains the lands at the rate of double their yearly *value*. And by the 11 Geo. II. c. 13. in case any tenant, having power to determine his lease, shall give notice of his intention to quit the premises, and shall not deliver up the possession at the time contained in such notice, he shall thenceforth pay double the former rent for such time as he continues in possession.

CHAPTER VII.

Of Estates upon Condition.

ESTATES upon condition are of two sorts; estates upon condition *implied*, and estates upon condition *expressed*: under which last may be included estates held in *vadio*, gage, or pledge; estates by statute merchant, or statute staple; and estates held by *elegit*.

Estates upon condition *implied* in law are, where a grant of an estate has a condition annexed to it inseparable from its essence and constitution, although no condition be expressed in words. As if a grant be made to a man of an office generally, without adding other words, the law tacitly annexes thereto a secret condition, that the grantee shall duly execute his office; on breach of which condition it is lawful for the grantor, or his heirs, to oust him, and grant it to another person. For an office, either public or private, may be forfeited by mis-user or non-user, both of which are breaches of this implied condition. By *mis-user*, or abuse; as if a judge take a bribe, or a park-keeper kill deer without authority. By *non-user*, or neglect; which in public offices, that concern the administration of justice or the commonwealth, is of itself a direct and immediate cause of forfeiture; but non-user of a private office is no cause of forfeiture, unless some special damage be proved to be occasioned thereby.

An estate upon condition *expressed* in the grant itself is where an estate is granted, either in fee-simple or otherwise, with an express qualification annexed, whereby the estate granted shall either commence, be enlarged, or be defeated, upon performance or breach of such qualification or condition. These conditions are therefore either precedent or subsequent. Precedent are such as must happen or be performed before the estate can vest or be enlarged; subsequent are such, by the failure or non-performance of which an estate already vested may be defeated. Thus, if an estate for life be limited to A upon his marriage with B, the marriage is a precedent condition, and till that happen no estate is vested in A. Or, if a man grant to his lessee for years, that, upon payment of a hundred marks within the term, he shall have the fee, this also is a condition precedent, and the fee-simple passeth not till the hundred marks be paid. But if a man grant an estate in fee-simple, reserving to himself and his heirs a certain rent, and that if such rent be not paid at the time limited it shall be lawful for him and his heirs to re-enter and avoid the estate; in this case the grantee and his heirs have an estate upon condition subsequent, which is defeasible if the condition be not strictly performed.

Express conditions, if they be impossible at the time of

their creation, or afterwards become impossible by the act of God, or the act of the feoffor himself, or if they be contrary to law, or repugnant to the nature of the estate, are void. In any of which cases, if they be conditions subsequent, that is, to be performed after the estate is vested, the estate shall become absolute in the tenant. But if the condition be precedent, or to be performed before the estate vests, as a grant to a man, that if he kill another, or go to Rome in a day, he shall have an estate in fee; here the void condition being precedent, the estate which depends thereon is also void, and the grantee shall take nothing by the grant, for he hath no estate until the condition be performed.

There are some estates defeasible upon condition subsequent, that require a more particular notice; such are—

Estates held in *vadio*, in gage, or pledge; which are of two kinds, *vivum vadium*, or living pledge; and *mortuum vadium*, dead pledge, or mortgage.

Vivum vadium, or living pledge, is when a man borrows a sum (suppose 200*l.*) of another, and grants him an estate, as of 20*l.* a year, to hold till the rents and profits shall repay the sum so borrowed. This is an estate conditioned to be void as soon as such sum is raised. And in this case the land or pledge is said to be living; it subsists and survives the debt, and immediately on the discharge of that results back to the borrower.

MORTGAGES.

But *mortuum vadium*, a dead pledge, or mortgage, (which is much more common than the other) is where a man borrows of another a specific sum (suppose 200*l.*) and grants him an estate in fee, on condition that if he (the mortgagor) shall repay the mortgagee the said sum of 200*l.* on a certain day mentioned in the deed, that then the mortgagor may re-enter on the estate so granted in pledge; or, as is now the more usual way, that then the mortgagee shall re-convey the estate to the mortgagor: in this case the land, which is so put in pledge, is by law, in case of nonpayment at the time limited, for ever dead and gone from the mortgagor; and the mortgagee's estate in the land is then no longer conditional, but absolute. But so long as it continues conditional, that is, between the time of lending the money and the time allotted for payment, the mortgagee is called tenant in mortgage. But, as it was formerly a doubt whether, by taking such estate in fee, it did not become liable to the wife's dower and other incumbrances of the mortgagee (though that doubt has been long ago over-ruled by the courts of equity), it therefore became usual to grant only a long term of years by way of mortgage, with condition to be void on repayment of the mortgage-money; which course has been since pretty generally continued, principally because on the death of the mortgagee such term becomes vested in his personal representatives, who alone are entitled in equity to receive the money lent, of whatever nature the mortgage may happen to be.

As soon as the estate is created, the mortgagee may immediately enter on the lands; but is liable to be dispossessed upon performance of the condition, by payment of the mortgage-money at the day limited. And therefore the usual way is to agree that the mortgagor shall hold the land till the day assigned for payment; when, in case of failure, whereby the estate becomes absolute, the mortgagee may enter upon it, and take possession, without any possibility at law of being afterwards evicted by the mortgagor, to whom the land is now for ever dead.

But here again the courts of equity interpose; and though a mortgage be thus forfeited, and the estate absolutely vested in the mortgagee at the common law, yet they will consider the real value of the tenements compared with the sum borrowed; and if the estate be of greater value than the sum lent thereon, they will allow the mortgagor at any reasonable time to recall or redeem his estate, paying to the mortgagee his principal, interest, and expences; for otherwise in strictness of law, an estate worth 1000*l.* might be forfeited for nonpayment of 100*l.* or a less sum.

This reasonable advantage, allowed to mortgagors, is called the *equity of redemption*; and this enables a mortgagor to call on the mortgagee, who has possession of his estate, to deliver it back, and account for the rents and profits received, on payment of his whole debt and interest; thereby turning the *mortuum* into a kind of *vivum vadium*. But, on the other hand, the mortgagee may either compel the sale of the estate, in order to get the whole of his money immediately, or else call upon the mortgagor to redeem his estate presently, or in default thereof to be for ever *foreclosed* from redeeming the same, that is, to lose his equity of redemption without possibility of recall; and also, in some cases of fraudulent mortgages, the fraudulent mortgagor forfeits all equity of redemption whatsoever.

By the 4 & 5 W. & M. if any person mortgage his estate, and do not previously inform the mortgagee in writing of a prior mortgage, or of any judgment or incumbrance which he has voluntarily brought upon the estate, the mortgagee shall hold the estate as an absolute purchaser, free from the equity of redemption of the mortgagor.

It is not usual for mortgagees to take possession of the mortgaged estate, unless where the security is precarious or small, or where the mortgagor neglects the payment of interest. To recover the rents and profits of the estate, it has been determined, that where there is a tenant in possession, by a lease prior to the mortgage, the mortgagee may at any time give him notice to pay the rent to him, and he may distrain for all the rent which is due at the time of the notice, and also for all that accrues afterwards. The mortgagor has no interest in the premises, but by the mere indulgence of the mortgagee: he has not even the estate of a tenant at will; for it is held, he may be prevented from carrying away the emblements, or the crops which he himself has sown. And if a mortgagor grant a lease after the mortgage,

the mortgagee may recover the possession of the premises in an ejectment against the tenant in possession, without a previous notice to quit.

By the 7 Geo. II. c. 20. after payment or tender by the mortgagor of principal, interest, and costs, the mortgagee can maintain no ejectment, but may be compelled to re-assign his securities.

It has been said to be an established rule of equity, that a second mortgagee, who has the title deeds, without notice of any prior incumbrance, shall in all cases be preferred; because if a mortgagee lend money upon real property without taking the title deeds, he enables the mortgagor to commit a fraud. But Lord Thurlow afterwards observed upon this, that he did not conceive that the not taking of the title deeds was alone sufficient to postpone the first mortgagee; if it were so, there could be no such thing as a mortgage of the reversion: and he held that a second mortgagee in possession of the title deeds was preferred only in cases where the first had been guilty of fraud or gross negligence. It seems, however, that fraud or gross negligence would be presumed, unless the mortgagee could shew that it was impossible for him to obtain possession of the title deeds, or that he had used the due and necessary diligence for that purpose.

Whatever may be the value of the estate, it is of great importance to those who lend money upon real security to be certain that there is no prior mortgage upon the estate; for it has been long settled, that if a third mortgagee, who at the time of his mortgage had no notice of the second, purchase the first mortgage, even pending a bill filed by the second to redeem the first, both the first and third mortgagees shall be paid out of the estate before any share of it can be appropriated to the second; the reason assigned is, that the third, by thus obtaining the legal estate, has both law and equity on his side, which supersede the mere equity of the second. And even Lord Hale held it right, that the third should thus seize what he called a *tabula in naufragio*, a plank in the shipwreck, and so leave the second to perish. But in mortgages where none has the legal estate, the rule in equity is, *qui prior est tempore, potior est jure*, the first has the strongest claim.

STATUTE MERCHANT AND STATUTE STAPLE.

A fourth species of estates defeasible on a condition subsequent are those held by statute merchant and statute staple, which are very nearly related to the *vivum vadium* before mentioned, or estates held till the profits thereof shall discharge a debt liquidated or ascertained. For both the statute merchant and statute staple are securities for money; the one entered into before the chief magistrate of some trading town, pursuant to the 13 Edw. I. *de mercatoribus*, and thence called a statute merchant; the other, pursuant to the 27 Edw. II. c. 9. before the mayor of the staple, that is to say, the grand mart for the principal commodi-

ties or manufactures of the kingdom, formerly held by act of parliament in certain trading towns, from whence this security is called a statute staple. They are both securities for debts acknowledged to be due, and originally permitted only among traders, for the benefit of commerce; whereby not only the body of the debtor may be imprisoned, and his goods seized in satisfaction of the debt, but also his lands may be delivered to the creditor, till out of the rents and profits of them the debt may be satisfied; and, during such time as the creditor so holds the lands, he is tenant by statute merchant or statute staple.

ESTATES BY ELEGIT.

Another similar conditional estate, created by operation of law for security and satisfaction of debts, is called an estate by *elegit*. This is the name of a writ founded on the statute of Westm. 2. by which, after a plaintiff has obtained judgment for his debt at law, the sheriff gives him possession of one half of the defendant's lands and tenements, to be occupied and enjoyed until his debts and damages be fully paid; and, during the time he so holds them, he is called tenant by *elegit*.

CHAPTER VIII.

Of Estates in Remainder and Reversion.

AN estate in remainder may be defined to be an estate limited to take effect and be enjoyed after another estate is determined. As if a man seised in fee simple grant lands to A for twenty years, and after the determination of the said term then to B and his heirs for ever; here A is tenant for years, remainder to B in fee. In the first place an estate for years is created or carved out of the fee, and given to A, and the residue or remainder of it is given to B. But both these interests are in fact only one estate; the present term of years, and the remainder afterwards, when added together, being equal only to one estate in fee. They are, indeed, different *parts*, but they constitute only *one whole*; they are carved out of one and the same inheritance; they are both created and may both subsist together, the one in possession, the other in expectancy. So if land be granted to A for twenty years, and after the determination of the said term to B for life, and after the determination of B's estate for life, if it be limited to C and his heirs for ever; this makes A tenant for years, with remainder to B for life, remainder over to C in fee. Now here the estate of inheritance undergoes a division into three portions; there is first A's estate for years carved out of it, and after that

B's estate for life, and then the whole that remains is limited to C and his heirs. And here also the first estate, and both the remainders for life and in fee, are one estate only, being nothing but parts or portions of one entire inheritance; and if there were an hundred remainders, it would still be the same thing. And hence also it is easy to collect, that no remainder can be limited after the grant of an estate in fee-simple; because a fee-simple is the highest and largest estate that a subject is capable of enjoying, and he that is tenant in fee hath in him the *whole* of the estate; a remainder therefore, which is only a portion or residuary *part* of the estate, cannot be reserved after the whole is disposed of. A particular estate, with all the remainders expectant thereon, is only one fee-simple; as 40*l.* is part of 100*l.* and 60*l.* is the remainder of it; wherefore, after a fee-simple is once vested, there can no more be a remainder limited thereon, than after the whole 100*l.* is appropriated there can be any residue subsisting.

There must necessarily be some particular estate precedent to the estate in remainder; as an estate for years to A, remainder to B for life; or an estate for life to A, remainder to B in tail. This precedent estate is called the *particular* estate, as being only a small part of the inheritance, the residue or remainder of which is granted over to another.

As no remainder can be created without such a precedent particular estate, therefore the particular estate is said to *support* the remainder. Hence it is generally true, that if the particular estate be void in its creation, or by any means be defeated afterwards, the remainder supported thereby shall be defeated also.

A second rule to be observed is this, that the remainder must commence, or pass out of the grantor, at the time of the creation of the particular estate. As where there is an estate to A for life, with remainder to B in fee, here B's remainder in fee passes from the grantor at the same time that seisin is delivered to A of his life-estate in possession. And it is this which induces the necessity at common law of delivery of seisin being made on the particular estate, whenever a freehold remainder is created. For if it be limited even on an estate for years, it is necessary that the lessee for years should have livery of seisin, in order to convey the freehold from and out of the grantor; otherwise the remainder is void.

A third rule respecting remainders is this, that the remainder must vest in the grantee during the continuance of the particular estate, or *eo instanti* that it determines. As, if A be tenant for life, remainder to B in tail; here B's remainder is vested in him at the creation of the particular estate to A for life. Or, if A and B be tenants for their joint lives, remainder to the survivor in fee; here, though during their joint lives the remainder is vested in neither, yet, on the death of either of them, the remainder vests instantly in the survivor; wherefore both these are good remainders. But if an estate be limited to A for life, remainder to the eldest son of B in tail, and A dies before B hath any son; here

the remainder will be void, for it did not vest in any one during the continuance, nor at the determination of the particular estate; and, even supposing that B should afterwards have a son, he shall not take by this remainder; for as it did not vest at or before the end of the particular estate, it never can vest at all, but is gone for ever.

CONTINGENT REMAINDERS.

It is upon these rules, but principally the last, that the doctrine of contingent remainders depends. For remainders are either vested or contingent.

Vested remainders (or remainders executed, where a present interest passes to the party, though to be enjoyed *in futuro*) are where the estate is invariably fixed, to remain to a determinate person after the particular estate is spent. As if A be tenant for twenty years, remainder to B in fee; here B's is a vested remainder, which nothing can defeat or set aside.

Contingent or executory remainders (whereby no present interest passes) are where the estate in remainder is limited to take effect, either to dubious and uncertain persons, or upon a dubious and uncertain event; so that the particular estate may chance to be determined, and the remainder never take effect.

First, they may be limited to a dubious and uncertain person. As if A be tenant for life, with remainder to B's eldest son (then unborn) in tail; this is a contingent remainder, for it is uncertain whether B will have a son or not: but the instant that a son is born, the remainder is no longer contingent, but vested. Though if A had died before the contingency happened, that is, before B's son was born, the remainder would have been absolutely gone; for the particular estate was determined before the remainder could vest. Nay, by the strict rule of law, if A were tenant for life, remainder to his own eldest son in tail, and A died without issue born, but leaving his wife big with child, and after his death a posthumous son was born, this son could not take the land by virtue of this remainder; for the particular estate determined before there was any person in *esse*, in whom the remainder could vest. But, to remedy this hardship, it is enacted by the 10 & 11 W. III. c. 16. that posthumous children shall be capable of taking in remainder, in the same manner as if they had been born in their father's life time; that is, the remainder is allowed to vest in them while yet in their mother's womb.

This species of contingent remainders to a person not in being must however be limited to some one that may by common possibility, *potentiâ propinquâ*, be in *esse* at or before the particular estate determines. As, if an estate be made to A for life, remainder to the heirs of B; now, if A die before B, the remainder is at an end; for during B's life he has no heir, *nemo est hæres viventis*: but if B die first, the remainder then immediately vests in his heir, who will be entitled to the land on the death of A. This is a good contingent remainder; for the possibility of B's dying before

A is *potentia propinqua*, and therefore allowed in law. But a remainder to the right heirs of B (if there be no such person as B in *esse*) is void. For here there must two contingencies happen: first, that such a person as B shall be born; and secondly, that he shall also die during the continuance of the particular estate; which makes it *potentia remotissima*, a most improbable possibility.

A remainder to a man's eldest son, who hath none, is good, for by common possibility he may have one; but if it be limited in particular to his son John or Richard, it is bad, if he have no son of that name; for it is too remote a possibility, that he should not only have a son, but a son of a particular name. A limitation of a remainder to a bastard before it is born, is not good; for though the law allows the possibility of having bastards, it presumes it to be a very remote and improbable contingency. Thus may a remainder be contingent on account of the uncertainty of the *person* who is to take it.

A remainder may also be contingent, where the person to whom it is limited is fixed and certain, but the *event* upon which it is to take effect is vague and uncertain. As, where land is given to A for life, and in case B survive him, then with remainder to B in fee; here B is a certain person, but the remainder to him is a contingent remainder, depending upon a dubious event, the uncertainty of his surviving A. During the joint lives of A and B it is contingent; and if B die first, it never can vest in his heirs, but is for ever gone; but if A die first, the remainder to B becomes vested.

Contingent remainders of either kind, if they amount to a freehold, cannot be limited on an estate for years, or any other particular estate less than a freehold. Thus, if land be granted to A for ten years, with remainder in fee to the right heirs of B, this remainder is void: but if granted to A for life, with a like remainder, it is good. For, unless the freehold pass out of the grantor at the time when the remainder is created, such freehold remainder is void; it cannot pass out of him, without vesting somewhere; and, in the case of a contingent remainder, it must vest in the particular tenant, else it can vest no where; unless, therefore, the estate of such particular tenant be of a freehold nature, the freehold cannot vest in him, and consequently the remainder is void.

Contingent remainders may be *defeated* by destroying or determining the particular estate upon which they depend, before the contingency happen whereby they become vested. Therefore, when there is tenant for life, with divers remainders in contingency, he may, not only by his death, but by alienation, surrender, or other methods, destroy and determine his own life-estate, before any of those remainders vest; the consequence of which is, that he utterly defeats them all. As, if there be tenant for life, with remainder to his eldest son unborn in tail, and the tenant for life, before any son is born, surrenders his life estate, he by that

means defeats the remainder in tail to his son: for his son not being in *esse* when the particular estate determined, the remainder could not then vest; and as it could not vest then, by the rules before laid down, it never can vest at all. In these cases, therefore, it is necessary to have trustees appointed to preserve the contingent remainders; in whom there is vested an estate in remainder for the life of the tenant for life, to commence when his estate determines. If therefore his estate for life determine otherwise than by his death, the estate of the trustees for the residue of his natural life will then take effect, and become a particular estate in possession, sufficient to support the remainders depending in contingency.

EXECUTORY DEVISES.

An executory devise of lands is such a disposition of them by will, that thereby no estate vests at the death of the deviser, but only on some future contingency. It differs from a remainder in three very material points: that it needs not any particular estate to support it; that by it a fee simple, or other less estate, may be limited after a fee simple, and that by this means a remainder may be limited of a chattel interest, after a particular estate for life created in the same.

The first case happens when a man devises a future estate to arise upon a contingency; and, till that contingency happens, does not dispose of the fee simple, but leaves it to descend to his heir at law. As if one devise land to a feme sole and her heirs, upon her day of marriage; here is, in effect, a contingent remainder without any particular estate to support it,—a freehold commencing *in futuro*. This limitation, though it would be void in a deed, yet is good in a will, by way of executory devise. For, since by a devise a freehold may pass without a corporeal tradition or livery of seisin (as it must do, if it pass at all), therefore it may commence *in futuro*; because the principal reason why it cannot commence *in futuro* in other cases is the necessity of actual seisin, which always operates *in presenti*. And since it may thus commence *in futuro*, there is no need of a particular estate to support it; the only use of which is to make the remainder, by its unity with the particular estate, a present interest. And hence also it follows, that such an executory devise, not being a present interest, cannot be barred by a recovery suffered before it commences.

By executory devise a fee, or other less estate, may be limited after a fee. And this happens where a deviser devises his whole estate in fee, but limits a remainder thereon to commence on a future contingency. As if a man devise land to A and his heirs, but, if he die before the age of twenty-one, then to B and his heirs; this remainder, though void in a deed, is good by way of executory devise. But, in both these species of executory devises, the contingencies ought to be such as may happen within a reasonable time; as within one or more life or lives in being, or within

a moderate term of years. The utmost length that has been hitherto allowed for the contingency of an executory devise of either kind to happen in, is that of a life or lives in being, and one and twenty years afterwards. As, when lands are devised to such unborn son of a feme covert as shall first attain the age of twenty-one and his heirs, the utmost length of time that can happen before the estate can vest, is the life of the mother and the subsequent infancy of her son; and this hath been decreed to be a good executory devise.

By the 89 & 40 Geo. III. c. 98. it is enacted, that no property (unless for payment of debts, or raising childrens' portions) shall be so disposed of as that the rents or profits can accumulate for a longer period than the life of the grantor, or the term of twenty-one years after his death, or the minority of any person then living; but shall go as if no such accumulation had been directed.

By executory devise a term of years may be given to one man for his life, and afterwards limited over in remainder to another, which could not be done by deed; for, by law, the first grant of it to a man for life was a total disposition of the whole term; a life estate being esteemed of a higher or larger nature than any term of years: yet, in order to prevent the danger of perpetuities, it was settled, that though such remainders may be limited to as many persons successively as the deviser thinks proper, yet they must all be *in esse* during the life of the first devisee; for then all the candles are lighted and are consuming together, and the ultimate remainder is in reality only to that remainder-man who happens to survive the rest; and it was also settled, that such remainder may not be limited to take effect, unless upon such contingency as must happen (if at all) during the life of the first devisee.

ESTATES IN REVERSION.

An estate in reversion is the residue of an estate left in the grantor, to commence in possession after the determination of some particular estate granted out by him. As, if there be a gift in tail, the reversion of the fee is, without any special reservation, vested in the donor by act of law; and so also the reversion, after an estate for life, years, or at will, is sometimes in the lessor. For the fee simple of all lands must abide somewhere; and if he, who was before possessed of the whole, carve out of it any smaller estate, and grant it away, whatever is not so granted remains in him. A reversion is never therefore created by deed or writing, but arises from construction at law; a remainder can never be limited, unless by either deed or devise. But both are equally transferable, when actually vested, being both estates in *presenti*, though taking effect in *futuro*.

In order to assist such persons as have any estate in remainder, reversion, or expectancy, after the death of others, against fraudulent concealments of their deaths, it is enacted by the 6 Ann. c. 18. that all persons on whose lives any lands or tene-

ments are holden, shall (upon application to the Court of Chancery, and order made thereupon) once in every year, if required, be produced to the court or its commissioners; or, upon neglect or refusal, they shall be taken to be actually dead, and the person entitled to such expectant estate may enter upon and hold the lands and tenements, till the party shall appear to be living.

Before we conclude, it may be proper to observe, that whenever a greater estate and a less coincide and meet in one and the same person, without any intermediate estate, the less is immediately annihilated, or, in the law phrase, is said to be *merged*, that is, sunk or drowned in the greater. Thus, if there be tenant for years, and the reversion in fee simple descends to, or is purchased by him, the term of years is merged in the inheritance, and shall never exist any more. But they must come to one and the same person in one and the same right; else, if the freehold be in his own right, and he has a term in right of another, there is no merger. Therefore, if tenant for years die, and make him who hath the reversion in fee his executor, whereby the term of years vests also in him, the term shall not merge; for he hath the fee in his own right, and the term of years in right of the testator, and subject to his debts and legacies. So also, if he who hath the reversion in fee marries the tenant for years, there is no merger: for he hath the inheritance in his own right, the lease in right of his wife. An estate tail is an exception to this rule; for a man may have in his own right both an estate tail and reversion in fee; and the estate tail, though a less estate, shall not merge in the fee. For estates tail are protected and preserved from merger by the operation and construction, though not by the express words, of the statute *De donis*.

CHAPTER VIII.

Of Estates in Severalty, Joint Tenancy, Coparcenary, and Common.

ESTATES IN SEVERALTY.

HE that holds lands or tenements in severalty, or is sole tenant thereof, is he that holds them in his own right only, without any other person being joined or connected with him in point of interest during his estate therein. This is the most common way of holding an estate; and therefore we may make the same observations here, that we did upon estates in possession, as contradistinguished from those in expectancy, that there is little or nothing peculiar to be remarked concerning it, since all estates are supposed to be of this sort, unless where they are expressly declared to be otherwise.

ESTATES IN JOINT TENANCY.

An estate in joint tenancy is where lands or tenements are granted to two or more persons, to hold in fee-simple, fee-tail, for life, for years, or at will. In consequence of such grants an estate is called an estate in joint tenancy, and sometimes an estate in *jointure*; which word, as well as the other, signifies an union or conjunction of interest.

In unfolding this title and the two remaining ones, we will first inquire how these estates may be *created*; next, their *properties* and respective *incidents*; and, lastly, how they may be *severed* or *destroyed*.

The *creation* of an estate in joint tenancy depends on the wording of the deed or devise, by which the tenants claim title; for this estate can only arise by purchase or grant, that is, by the act of the parties, and never by the mere act of law. Now, if an estate be given to a plurality of persons, without adding any restrictive, exclusive, or explanatory words, as if an estate be granted to A and B and their heirs, this makes them immediately joint tenants in fee of the lands.

The *properties* of a joint estate are derived from its unity, which is fourfold; the unity of *interest*, the unity of *title*, the unity of *time*, and the unity of *possession*; or, in other words, joint-tenants have one and the same interest, accruing by one and the same conveyance, commencing at one and the same time, and held by one and the same undivided possession.

First, they must have one and the same *interest*. One joint tenant cannot be entitled to one period of duration or quantity of interest in lands, and the other to a different; one cannot be tenant for life, and the other for years; one cannot be tenant in fee, and the other in tail.

Secondly, joint tenants must also have an unity of *title*. Their estate must be created by one and the same act, whether legal or illegal; as, by one and the same grant, or by one and the same disseisin. Joint tenancy cannot arise by descent or act of law; but merely by purchase or acquisition, by the act of the party: and unless that act be one and the same, the two tenants would have different titles; and if they had different titles, one might prove good, and the other bad, which would absolutely destroy the jointure.

Thirdly, there must be an unity of *time*. Their estates must be vested at one and the same period, as well as by one and the same title.

Lastly, there must be an unity of *possession*. Joint tenants are said to be seized *per my et per tout*, by the *half* or *moiety*, and by *all*: that is, they each of them have the entire possession, as well of every *parcel* as of the *whole*. They have not one of them a seisin of one half or moiety, and the other of the other moiety; neither can one be exclusively seised of one acre, and his companion of another; but each has an undivided moiety of

the whole, and not the whole of an undivided moiety. And if a grant be made of a joint estate to husband and wife and a third person, the husband and wife shall have one moiety, and the third person the other moiety, in the same manner as if it had been granted only to two persons. So if the grant is to husband and wife and two others, the husband and wife take one-third in joint tenancy.

If an estate in fee be given to a man and his wife, they are neither properly joint tenants nor tenants in common; for husband and wife being always considered as one person in law, they cannot take the estate by moieties, but both are seised of the entirety, *per tout et non per my*: the consequence of which is, that neither the husband nor the wife can dispose of any part without the assent of the other, but the whole must remain to the survivor.

Upon these principles, of a thorough and intimate union of interest and possession, depend many other consequences and incidents to the joint tenant's estate. If two joint tenants let a verbal lease of their land, reserving rent to be paid to one of them, it shall enure to both, in respect of the joint reversion. If their lessee surrender his lease to one of them, it shall enure to both, because of the privity or relation of their estate. On the same reason, livery of seisin made to one joint tenant shall enure to both of them; and the entry, or re-entry, of one joint tenant is as effectual in law as if it were the act of both. In all actions also relating to their joint estate, one joint tenant cannot sue or be sued without joining the other. But if two or more joint tenants be seised of an advowson, and they present different clerks, the bishop may refuse to admit either; because neither joint tenant hath a several right of patronage, but each is seised of the whole; and if they do not both agree within six months, the right of presentation shall lapse. Upon the same ground it is held, that one joint tenant cannot have an action against another for trespass, in respect of his land; for each has an equal right to enter on any part of it. But one joint tenant is not capable by himself to do any act which may tend to defeat or injure the estate of the other, as to let leases, or to grant copyholds: and if any waste be done, which tends to the destruction of the inheritance, one joint tenant may have an action of waste against the other. So, too, by the 4 Ann. c. 16. joint tenants may have actions of account against each other, for receiving more than their due share of the profits of the tenements held in joint tenancy.

From the same principle also arises the remaining grand incident of joint estates, viz. the doctrine of *survivorship*: by which, when two or more persons are seised of a joint estate of inheritance, for their own lives, or *par autre vie*, or are jointly possessed of any chattel interest, the entire tenancy upon the decease of any of them remains to the survivors, and at length to the last survivor; and he shall be entitled to the whole estate, whatever it be, whether an inheritance or a common freehold only, or even a less estate.

ESTATES IN COPARCENARY.

An estate held in coparcenary is where land of inheritance descends from the ancestor to two or more persons. It *arises* either by common law or particular custom. By common law: as where a person seised in fee-simple or fee-tail dies, and his next heirs are two or more females, his daughters, sisters, aunts, cousins, or their representatives; in this case they shall all inherit; and these co-heirs are then called coparceners, or, for brevity, parceners only. Parceners by particular custom are where lands descend, as in gavelkind, to all the males in equal degree, as sons, brothers, uncles, &c. And, in either of these cases, all the parceners put together make but one heir, and have but one estate among them.

The proprietors of parceners are in some respects like those of joint tenants; they have the same unities of interest, title, and possession. They may sue and be sued jointly for matters relating to their own land; and the entry of one of them shall in some cases enure as the entry of them all. They cannot have an action of trespass against each other: but herein they differ from joint tenants, that they are also excluded from maintaining an action of waste. Parceners also differ materially from joint tenants in four other points. They always claim by descent, whereas joint tenants always claim by purchase. Therefore if two sisters purchase lands, to hold to them and their heirs, they are not parceners, but joint tenants: and hence it likewise follows, that no lands can be held in coparcenary but estates of inheritance, which are of a descendible nature; whereas not only estates in fee and in tail, but for life or years, may be held in joint tenancy. Next, there is no unity of time necessary to an estate in coparcenary. For if a man have two daughters, to whom his estates descends in coparcenary, and one dies before the other, the surviving daughter and the heir of the other, or when both are dead, their two heirs, are still parceners; the estates vesting in each of them at different times, though it be the same quantity of interest, and held by the same title. Also, parceners, though they have an unity, have not an entirety of interest. They are properly entitled each to the whole of a distinct moiety; and of course there is no *jus accrescendi*, or survivorship, between them: for each part descends severally to their respective heirs, though the unity of possession continues.

The estate in coparcenary may be dissolved, either by partition, which disunites the possession; by alienation of one parcener, which disunites the title, and may disunite the interest; or by the whole at last descending to and vesting in one single person, which brings it to an estate in severalty.

TENANTS IN COMMON.

Tenants in common are such as hold by several and distinct titles, but by unity of possession; because none knoweth his own severalty, and therefore they all occupy promiscuously.

This tenancy, therefore, happens where there is an unity of possession merely, but perhaps an entire disunion of interest, of title, and of time. For if there be two tenants in common of lands, one may hold his part in fee simple, the other in tail, or for life; so that there is no necessary unity of interest; one may hold by descent, the other by purchase; or the one by purchase from A, the other by purchase from B; so that there is no unity of title: one's estate may have been vested fifty years, the other's but yesterday; so that there is no unity of time. The only unity there is, is that of possession.

Tenancy in common may be created either by the destruction of the two other estates, in joint tenancy and coparcenary, or by special limitation in a deed.

By the *destruction of the other two estates* we mean such destruction as does not sever the unity of possession, but only the unity of title or interest: as if one of two joint tenants in fee aliene his estates for the life of the alienee, the alienee and the other joint tenants are tenants in common; for they have now several titles, the other joint tenant by the original grant, the alienee by the new alienation; and they also have several interests, the former joint tenant in fee simple, the alienee for his own life only. If one of two parceners aliene, the alienee and the remaining parcener are tenants in common; because they hold by different titles, the parcener by descent, the alienee by purchase. So likewise, if there be a grant to two *men*, or two *women*, and the heirs of their bodies, here the grantees shall be joint tenants of the life estate, but they shall have several inheritances: because they cannot, possibly, have one heir of their two bodies, as might have been the case, had the limitation been to *a man and woman*, and the heirs of their bodies begotten; and in this and the like cases, their issue shall be tenants in common; because they must claim by different titles, one as heir of A, and the other as heir of B; and those, too, not titles by purchase, but descent. In short, whenever an estate in joint tenancy or coparcenary is dissolved, so that there be no partition made, but the unity of possession continues, it is turned into a tenancy in common.

A tenancy in common may also be created by *express limitation in a deed*; but here care must be taken not to insert words which imply a joint estate; and then if lands be given to two or more, and it be not joint tenancy, it must be a tenancy in common. And this nicety in the wording of grants makes it the most usual as well as the safest way, when a tenancy in common is meant to be created, to add express words of exclusion as well as description, and limit the estate to A and B, to hold *as tenants in common, and not as joint tenants*.

As to the *incidents* attending a tenancy in common: tenants in common (like joint tenants) are compellable by the statutes of Henry VIII. and William III. to make partition of their lands; which they were not at common law. They properly take by

distinct moieties, and have no entirety of interest; and therefore there is no survivorship between tenants in common. The other incidents are such as merely arise from the unity of possession, and are therefore the same as appertain to joint tenants merely upon that account; such as being liable to reciprocal actions of waste, and of account, by the statutes of West. 2. c. 22. and 4 Ann. c. 16.

CHAPTER X.

Of Descents.

THE methods of acquiring on the one hand, and of losing on the other, a title to estates in things real, are reduced by law to two: descent, where the title is vested in a man by the single operation of law; and purchase, where the title is vested in him by his own act or agreement.

Purchase is used in contradistinction to descent, and is any other mode of acquiring real property, *viz.* by devise, and by every species of gift or grant; and as the land taken by purchase has very different inheritable qualities from land taken by descent, the distinction is important.

Descent, or hereditary succession, is the title whereby a man on the death of his ancestor acquires his estate by right of representation, as his heir at law. An *heir*, therefore, is he upon whom the law casts the estate immediately on the death of the ancestor; and an estate so descending to the heir, is in law called an *inheritance*.

The doctrine of descents, or the law of inheritances in fee-simple, is a point of the highest importance. And, as it depends not a little on the nature of the kindred, and the several degrees of consanguinity, it will be previously necessary to state, as briefly as possible, the true notion of this kindred or alliance in blood.

Consanguinity, or kindred, is defined by the writers on these subjects to be the connexion or relation of persons descended from the same stock or common ancestor. This consanguinity is either lineal or collateral.

Lineal consanguinity is that which subsists between persons, of whom one is descended in a direct line from the other, as between John Stiles and his father, grandfather, great-grandfather, and so upwards in the direct ascending line; or between John Stiles and his son, grandson, great-grandson, and so downwards in the direct descending line. Every generation, in this lineal direct consanguinity, constitutes a different degree, reckoning either upwards

or downwards: the father of John Stiles is related to him in the first degree, and so likewise is his son; his grandsire and grandson in the second; his great-grandsire and great-grandson, in the third.

Collateral kindred answers to the same description: collateral relations agreeing with the lineal in this, that they descend from the same stock or ancestor; but differing in this, that they do not descend one from the other. Collateral kinsmen are such then as lineally spring from one and the same ancestor, who is the *stirps*, or root, the trunk, or common stock, from whence these relations are branched out. As if John Stiles have two sons, who have each a numerous issue; both these issues are lineally descended from John Stiles as their common ancestor; and they are collateral kinsmen to each other, because they are all descended from this common ancestor, and all have a portion of his blood in their veins, which denominates them *consanguineos*. And we must be careful to remember, that the very being of collateral consanguinity consists in this descent from one and the same common ancestor.

The method of computing these degrees in the canon law, which our law has adopted, is as follows. We begin with the common ancestor, and reckon downwards; and in whatsoever degree the two persons, or the most remote of them, is distant from the common ancestor, that is the degree in which they are related to each other. Thus, Titus and his brother are related in the first degree; for from the father to each of them is counted only one: Titus and his nephew are related in the second degree; for the nephew is two degrees removed from the common ancestor, viz. his own grandfather, the father of Titus.

We shall next proceed to lay down a series of rules, or canons of inheritance, according to which estates are transmitted from the ancestor to the heir.

The first rule is, that inheritances shall lineally descend to the issue of the person who last died actually seised, *in infinitum*; but shall never lineally ascend.

To explain the more clearly both this and the subsequent rules, it must be observed, that by law no inheritance can vest, nor can any person be the actual complete heir of another, till the ancestor is previously dead. Before that time the person who is next in the line of succession is called an heir apparent, or heir presumptive. *Heirs apparent* are such whose right of inheritance is indefeasible, provided they outlive the ancestor: as the eldest son, or his issue, who must by the course of the common law be heir to the father whenever he happens to die. *Heirs presumptive* are such who, if the ancestor should die immediately, would, in the present circumstances of things, be his heirs; but whose right of inheritance may be defeated by the contingency of some nearer heir being born: as a brother or nephew, whose presumptive succession may be destroyed by the birth of a child; or a daughter, whose present hopes may be hereafter cut off by the birth of a

son. Nay, even if the estate hath descended, by the death of the owner, to such brother or nephew, or daughter; in the former case, the estate shall be divested and taken away by the birth of a posthumous child; and in the latter, shall also be totally divested by the birth of a posthumous son.

We must also remember, that no person can be properly such an ancestor as that an inheritance of lands or tenements can be derived from him, unless he have had actual seisin of such lands, either by his own entry, or by the possession of his own or his ancestor's lessee for years, or by receiving rent from a lessee of a freehold; or unless he have had what is equivalent to corporeal seisin in hereditaments that are incorporeal, such as the receipt of rent, a presentation to the church in case of an advowson, and the like. But he shall not be accounted an ancestor, who hath had only a bare right or title to enter, or be otherwise seised.

And therefore all the cases which will be mentioned are upon the supposition, that the deceased (whose inheritance is now claimed) was the last person actually seised thereof. For the law requires this notoriety of possession, as evidence that the ancestor had that property in himself, which is now to be transmitted to his heir. The seisin therefore of any person, thus understood, makes him the root, or stock, from which all future inheritance by right of blood must be derived.

When therefore a person dies so seised, the inheritance first goes to his issue: as if there be Geoffrey, John, and Matthew, grandfather, father, and son; and John purchase lands, and die; his son Matthew shall succeed him as heir, and not the grandfather Geoffrey, to whom the land shall never ascend, but shall rather escheat to the lord.

A second general rule is, that the male issue shall be admitted before the female.

Thus, sons shall be admitted before daughters. As if John Stiles have two sons, Matthew and Gilbert, and two daughters, Margaret and Charlotte, and die; first Matthew, and (in case of his death without issue) then Gilbert, shall be admitted to the succession in preference to both the daughters.

A third rule of descent is this: that where there are two or more males in equal degree, the eldest only shall inherit; but the females all together.

As if a man have two sons, Matthew and Gilbert, and two daughters, Margaret and Charlotte, and die; Matthew his eldest son shall alone succeed to his estate, in exclusion of Gilbert the second son, and both the daughters: but if both the sons die without issue before the father, the daughters Margaret and Charlotte shall both inherit the estate as coparceners.

However, the succession by primogeniture, even among females, takes place as to the inheritance of the crown; wherein the necessity of a sole and determinate succession is as great in the one sex as the other. And the right of sole succession, though not of primogeniture, is also established with respect to female digni-

ties and titles of honour. For if a man hold an earldom to him and the heirs of his body, and die, leaving only daughters; the eldest shall not of course be countess, but the dignity is in suspense or abeyance, till the king shall declare his pleasure; for he, being the fountain of honour, may confer it on which of them he pleases.

A fourth rule of descent is this; that the lineal descendants, *in infinitum*, of any person deceased shall represent their ancestor, that is, shall stand in the same place as the person himself would have done, had he been living.

Thus the child, grandchild, or great-grandchild, (either male or female) of the eldest son succeeds before the younger son, and so on *ad infinitum*. And these representatives shall take neither more nor less, but just so much as their principals would have done. As if there be two sisters, Margaret and Charlotte: and Margaret die leaving six daughters, and then John Stiles, the father of the two sisters, die without other issue: these six daughters shall take among them exactly the same as their mother Margaret would have done, had she been living, that is, a moiety of the lands of John Stiles in coparcenary; so that, upon partition made, if the land be divided into twelve parts, thereof Charlotte, the surviving sister, shall have six, and her six nieces, the daughters of Margaret, one a-piece.

This taking by representation is called succession *in stirpes*, according to the roots; since all the branches inherit the same share that their root, whom they represent, would have done. And among these several issues, or representatives of the respective roots, the same preference to males and the same right of primogeniture obtain, as would have obtained at the first among the roots themselves, the sons or daughters of the deceased. As if a man have two sons, A and B, and A die, leaving two sons, and then the grandfather dies; now the eldest son of A shall succeed to the whole of his grandfather's estate; and if A had left only two daughters, they should have succeeded also to equal moieties of the whole, in exclusion of B and his issue. But if a man have only three daughters, C, D, and E; and C dies leaving two sons, D leaving two daughters, and E leaving a daughter and a son who is younger than his sister; here, when the grandfather dies, the eldest son of C shall succeed to one third, in exclusion of the younger; the two daughters of D to another third in partnership; and the son of E to the remaining third, in exclusion of his eldest sister. And the same right of representation, guided and restrained by the same rules of descent, prevails downward *in infinitum*.

A fifth rule is, that, on failure of lineal descendants or issue of the person last seised, the inheritance shall descend to his collateral relations, being of the blood of the first purchaser; subject to the three preceding rules.

Thus, if Geoffrey Stiles purchase lands, and they descend to John Stiles his son, and John dies seised thereof without issue; whoever

succeeds to this inheritance must be of the blood of Geoffrey, the first purchaser of this family. The first purchaser is he who first acquired the estate to his family, whether the same was transferred to him by sale or by gift, or by any other method, except only that of descent.

If lands come to John Stiles by descent from his mother, Lucy Baker, no relation of his father (as such) shall ever be his heir of these lands; and *vice versa*, if they descended from his father Geoffrey Stiles, no relation of his mother (as such) shall ever be admitted thereto; for his father's kindred have none of his mother's blood, nor have his mother's relations any share of his father's blood. And if the estate descended from his father's father, George Stiles, the relations of his father's mother, Cecilia Kempe, shall for the same reason never be admitted, but only those of his father's father.

This then is the great and general principle upon which the law of collateral inheritances depends; that, upon failure of issue in the last proprietor, the estate shall descend to the blood of the last purchaser; or that it shall result back to the heirs of the body of that ancestor, from whom it either really has, or is supposed by fiction of law to have originally descended.

The other rules of inheritance are only rules of evidence calculated to investigate who the purchasing ancestor was.

A sixth rule is, that the collateral heir of the person last seized must be his next collateral kinsman of the whole blood.

First, he must be his next collateral kinsman, either personally or *jure representationis*; which proximity is reckoned according to the canonical degrees of consanguinity before mentioned. Therefore the brother being in the first degree, he and his descendants shall exclude the uncle and his issue, who is only in the second.

The right of representation being thus established, the former part of the present rule amounts to this; that, on failure of issue of the person last seized, the inheritance shall descend to the other subsisting issue of his next immediate ancestor. Thus, if John Stiles die without issue, his estate shall descend to Francis his brother, or his representatives; he being lineally descended from Geoffrey Stiles, John's next immediate ancestor or father. On failure of brethren, or sisters, and their issue, it shall descend to the uncle of John Stiles, the lineal descendant of his grandfather George; and so on *in infinitum*.

The seventh and last rule is, that in collateral inheritances the male stock shall be preferred to the female; that is, kindred derived from the blood of the male ancestors, however remote, shall be admitted before those from the blood of the female, however near, unless where the lands have, in fact, descended from a female.

Thus, the relations on the father's side are admitted *in infinitum* before those on the mother's side are admitted at all; and the relations of the father's father before those of the father's mother; and so on.

But whenever the lands have notoriously descended to a man from his mother's side, this rule is totally reversed; and no relation of his by the father's side (as such) can ever be admitted to them; because he cannot possibly be of the blood of the first purchaser. And so *à converso*, if the lands descended from the father's side, no relation of the mother (as such) shall ever inherit. So also, if they in fact descended to John Stiles from his father's mother, Cecilia Kempe; here not only the blood of Lucy Baker his mother, but also of George Stiles his father's father, is perpetually excluded. And in like manner, if they be known to have descended from Frances Holland, the mother of Cecilia Kempe, the line not only of Lucy Baker, and of George Stiles, but also of Luke Kempe, the father of Cecilia, is excluded. Whereas when the side from which they descended is forgotten, or never known (as in the case of an estate newly purchased to be holden *ut feudum antiquum*) here the right of inheritance first runs up all the father's side, with a preference to the male stocks in every instance; and if it find no heirs there, it then, and then only, resorts to the mother's side; leaving no place untried in order to find heirs that may by possibility be derived from the original purchaser. The greatest probability of finding such was among those descended from the male ancestors: but, upon failure of issue there, they may possibly be found among those derived from the females.

CHAPTER XI,

Of Deeds and Conveyances.

A DEED is a writing sealed and delivered by the parties. If a deed be made by more parties than one, there ought to be regularly as many copies of it as there are parties, and each should be cut or indented on the top or side, to tally or correspond with the other; which deed, so made, is called an *indenture*.

When the several parts of an indenture are interchangeably executed by the several parties, that part or copy which is executed by the grantor is usually called the *original*, and the rest are *counterparts*. A deed made by one party only is not indented, but polled or shaved even; and therefore called a *deed poll*, or a single deed.

Of the *requisites* of a deed; the first is, that there be persons able to contract and be contracted with, for the purposes intended by the deed; and also a thing or subject matter to be contracted for: all which must be expressed by sufficient names. So that in

every grant there must be a grantor, a grantee, and a thing granted ; in every lease, a lessor, a lessee, and a thing demised.

Secondly, the deed must be founded upon good and sufficient consideration, not upon an usurious contract, nor upon fraud or collusion, either to deceive purchasers *bonâ fide*, or just and lawful creditors ; any of which bad considerations will vacate the deed, and subject such persons as put the same in ure to forfeitures, and often to imprisonment. A deed also, or other grant, made without any consideration, is as it were of no effect ; for it is construed to enure, or to be effectual, only to the use of the grantor himself. The consideration may be either a good or a valuable one. A *good* consideration is such as that of blood, or of natural love and affection, when a man grants an estate to a near relation ; being founded on motives of generosity, prudence, and natural duty. A *valuable* consideration is such as money, marriage, or the like, which the law esteems an equivalent given for the grant ; and is therefore founded on motives of justice. Deeds made upon good consideration only are considered as merely voluntary, and are frequently set aside in favour of creditors and *bonâ fide* purchasers.

Thirdly, the deed must be written. It must also have the regular stamps imposed on it by the several statutes for the increase of the public revenue ; else it cannot be given in evidence. Formerly many conveyances were made by parole, or word of mouth only, without writing ; but this giving a handle to a variety of frauds, the 29 Car. II. c. 3. enacts, that no lease, estate, or interest in lands, tenements, or hereditaments, made by livery of seisin or by parole only (except leases not exceeding three years from the making, and whereon the reserved rent is at least two thirds of the real value), shall be looked upon as of greater force than a lease or estate at will ; nor shall any assignment, grant, or surrender of any interest in any freehold hereditaments be valid, unless in both cases the same be put in writing, and signed by the party granting, or his agent lawfully authorized, in writing.

Fourthly, the matter written must be *legally* and *orderly* set forth ; that is, there must be words sufficient to specify the agreement and bind the parties, which sufficiency must be left to the courts of law to determine.

We will here enumerate the regular and orderly parts in a deed.

The *premises* may be used to set forth the number and names of the parties, with their additions or titles. They also contain the recital (if any) of such deeds, agreements, or matters of fact, as are necessary to explain the reasons upon which the present transaction is founded ; and herein also is set down the consideration upon which the deed is made. And then follows the certainty of the grantor, grantee, and the thing granted.

Next comes the *habendum et tenendum*, the having in possession and holding. The office of the *habendum* is properly to determine what estate or interest is granted by the deed ; though this may

be performed, and sometimes is performed in the premises. In which case the *habendum* may lessen, enlarge, explain, or qualify, but not totally contradict or be repugnant to the estate granted in the premises. The *tenendum*, "and to hold," is now of very little use, and is only kept in by custom.

Next follow the terms of stipulation (if any) upon which the grant is made; the first of which is the *reddendum*, or reservation whereby the grantor doth create or reserve some new thing to himself out of what he had before granted. As "rendering therefore yearly the sum of ten shillings," or a pepper-corn, or two days ploughing, or the like. To make a *reddendum* good, if it be of any thing newly created by the deed, the reservation must be to the grantors, or some or one of them, and not to any stranger to the deed. But if it be of ancient services or the like, annexed to the land, then the reservation may be to the lord of the fee. Another of the terms upon which a grant may be made is a *condition*; which is a clause of contingency, on the happening of which the estate granted may be defeated; as, "provided always, that if the mortgagor should pay the mortgagee 500*l.* upon such a day, the whole estate granted shall determine;" and the like.

Next may follow the clause of *warranty*; whereby the grantor doth, for himself and his heirs, warrant and secure to the grantee the estate so granted; which is a kind of covenant real, and can only be created by the verb *warrantizo*, or *warrant*. By the 4 & 5 Ann. c. 16. all warranties by any tenant for life shall be void against those in remainder or reversion; and all collateral warranties by any ancestor who has no estate of inheritance in possession shall be void against his heir.

After warranty usually follow *covenants*, or conventions, which are clauses of agreement contained in a deed, whereby either party may stipulate for the truth of certain facts, or may bind himself to perform or give something to the other. Thus the grantor may covenant that he hath a right to convey; or for the grantee's quiet enjoyment, or the like: the grantee may covenant to pay his rent, or keep the premises in repair, &c. If the covenantor covenant for himself and his *heirs*, it is then a covenant real, and descends upon the heirs, who are bound to perform it, provided they have assets by descent, but not otherwise: if he covenant also for his executors and administrators, his personal assets, as well as his real, are likewise pledged for the performance of the covenant; which makes such covenant a better security than any warranty.*

Lastly comes the *conclusion*, which mentions the execution and date of the deed, or the time of its being given or executed, either expressly or by reference to some day and year before-mentioned. Not but a deed is good, although it mention no date, or have a false date; or even if it have an impossible date, as the

* The executors and administrators are bound by every covenant, although not named, unless it be such a covenant as is to be performed personally by the covenantor, and there has been no breach before his death.

thirtieth of February: provided the real day of its being dated or given, that is, delivered, can be proved.

The next requisite for making a good deed is, the reading of it. This is necessary whenever any of the parties desire it; and if it be not done on his request, the deed is void as to him. If he can, he should read it himself; if he be blind or illiterate, another must read it to him. If it be read falsely, it will be void; at least, for so much as is mis-recited; unless it be agreed by collusion that the deed shall be read false on purpose to make it void, for in such case it shall bind the fraudulent party.

It is next requisite that the party whose deed it is should seal, and in most cases should sign it also.

Another requisite to a good deed is, that it be *delivered* by the party himself, or his certain attorney; which therefore is also expressed in the attestation, "sealed and delivered." A deed takes effect only from this transition, or delivery; for if the date be false or impossible, the delivery ascertains the time of it. And if another person seal the deed, yet if the party deliver it himself, he thereby adopts the sealing, and by a parity of reason the signing also, and makes them both his own. A delivery may be either absolute, that is, to the party or grantee himself; or to a third person, to hold till some conditions be performed on the part of the grantee: in which last case it is not delivered as a deed, but as an escrow; that is, as a scroll or writing, which is not to take effect as a deed till the conditions be performed, and then it is a deed to all intents and purposes.

The last requisite to the validity of a deed is the *attestation*, or execution of it *in the presence of witnesses*; though this is necessary rather for preserving the evidence, than for constituting the essence of the deed.

We are next to consider, how a deed may be avoided, or rendered of no effect. And from what has been before laid down it will follow, that if a deed want any of the essential requisites before mentioned—either proper parties, and a proper subject matter—a good and sufficient consideration—writing, on paper or parchment, duly stamped—sufficient and legal words, properly disposed—reading, if desired, before the execution—sealing, and by the statute, in most cases signing also—or delivery—it is a void deed *ab initio*.

It may also be avoided by matter *ex post facto*: as by rasure, interlining, or other alteration in any material part, unless a memorandum be made thereof at the time of the execution and attestation: by breaking off, or defacing the seal: by delivering it up to be cancelled, that is, to have lines drawn over it in the form of lattice-work, or *cancelli*; though the phrase is now used figuratively for any manner of obliteration or defacing: by the disagreement of such whose concurrence is necessary in order for the deed to stand: as the husband, where a feme covert is concerned; an infant, or person under duress, when those disabilities are removed; and the like; or by the judgment or decree of a court of judica-

ture. In any of these cases the deed may be voided, either in part or totally, according as the cause of avoidance is more or less extensive.

Having thus explained the general nature of deeds, we are next to consider their several species, together with their respective incidents. Deeds are either conveyances at common law, or such as receive their force and efficacy by virtue of the Statute of Uses.

Of conveyances by the common law, some may be called original, or primary conveyances, which are those by means whereof the benefit or estate is created, or first arises; others are derivative, or secondary, whereby the benefit or estate originally created is enlarged, restrained, transferred, or extinguished.

Original conveyances are the following; feoffment, gift, grant, lease, exchange, partition. *Derivative* are, release, confirmation, surrender, assignment, defeasance.

FEOFFMENT.

A feoffment is the most ancient method of conveyance, the most solemn and public, and therefore the most easily remembered and proved. And it may properly be defined, "the gift of any corporeal hereditament to another. He that so gives, or feoffs, is called the *feoffer*; and the person enfeoffed is denominated the *feoffee*."

But by the mere words of the deed the feoffment is by no means perfected; there remains a very material ceremony to be performed, called *livery of seisin*, without which the feoffee has but a mere estate at will. This livery of seisin is no other than the pure feudal investiture, or delivery of corporeal possession of the land or tenement; which was held absolutely necessary to complete the donation.

On the creation of a freehold remainder at one and the same time with a particular estate for years, at the common law, livery must be made to the particular tenant. But if such a remainder be created afterwards, expectant on a lease for years now in being, the livery must not be made to the lessee for years, for then it operates nothing; but it must be made to the remainder-man himself, by consent of the lessee for years, for without his consent no livery of the possession can be given, because such forcible livery would be an ejectment of the tenant from his term.

GIFTS.

The conveyance by gift is properly applied to the creation of an estate tail, as feoffment is to that of an estate in fee, and lease to that of an estate for life or years. It differs in nothing from a feoffment but in the nature of the estate passing by it; for the operative words of conveyance in this case are *do* or *dedi*, and gifts in tail are equally imperfect without livery of seisin as feoffments in fee-simple. In common acceptation, gifts are frequently confounded with the next species of deeds, which are

GRANTS.

A grant is the regular method by the common law of transferring the property of *incorporeal* hereditaments, or such things whereof no livery can be had. For which reason all corporeal hereditaments, as lands and houses, are said to lie in *livery*; and the others, as advowsons, commons, rents, reversions, &c. to lie in *grant*. These therefore pass merely by the delivery of the deed; for the operative words therein commonly used are *dedi et concessi*, "have given and granted."

LEASES.

A lease is properly a conveyance of any lands or tenements (usually in consideration of rent or other annual recompence) made for life, for years, or at will, but always for a less time than the lessor hath in the premises; for if it be for the whole interest, it is more properly an assignment than a lease. The usual words of operation in it are, "demise, grant, and to farm let." By this conveyance an estate for life, for years, or at will, may be created, either in corporeal or incorporeal hereditaments; though livery of seisin is indeed incident and necessary to one species of leases, viz. leases for life of corporeal hereditaments, but to no other.

By the common law, as it has stood for many centuries, all persons seised of an estate might let leases to endure so long as their own interest lasted, but no longer. Therefore tenant in fee-simple might let leases of any duration, for he hath the whole interest; but tenant in tail, or tenant for life, could make no leases which should bind the issue in tail or reversioner; nor could a husband seised *jure uxoris* make a firm or valid lease for any longer term than the joint lives of himself and his wife, for then his interest expired. Yet some tenants for life, where the fee-simple was in abeyance, might (with the concurrence of such as have the guardianship of the fee) make leases of equal duration with those granted by tenants in fee simple; such as parsons and vicars, with consent of the patron and ordinary. So also might bishops and deans, and such other sole ecclesiastical corporations, and corporations aggregate. Whereas now, by several statutes, this power, where it was unreasonable, and might be made an ill use of, is restrained; and where, in the other cases, the restraint by the common law seemed too hard, it is in some measure removed. The former statutes are called the *restraining*, the latter the *enabling* statute.

The *enabling* statute, 32 Hen. VIII. c. 28. empowers three manner of persons to make leases to endure for three lives, or one and twenty years, which could not do so before. As, first, tenant in tail may by such leases bind his issue in tail, but not those in remainder or reversion. Secondly, a husband seised in right of his wife in fee-simple or in fee-tail, provided the wife joins

in such lease, may bind her and her heirs thereby. Lastly, all persons seised of an estate of fee simple in right of their churches which extends not to parsons and vicars), may, without the concurrence of any other person, bind their successors. But then there must many requisites be observed, which the statute specifies, otherwise such leases are not binding. As, that the lease must be by indenture, and not by deed poll, or by parole. It must begin from the making, or day of the making, and not at any greater distance of time. If there be any old lease in being, it must be first absolutely surrendered or be within a year of expiring. It must be either for twenty-one years, or three lives, and not for both. It must not exceed this term, but may be for a shorter term. It must be of corporeal hereditaments, and not of such things as lie merely in grant; for no rent can be reserved thereout by the common law, as the lessor cannot resort to them to distrain.* It must be of lands and tenements most commonly letten for twenty years past; so that if they had been let for above half the time (or eleven out of the twenty) either for life or for years, at will, or by copy of court-roll, it is sufficient. The most usual and customary form of rent, for twenty years past, must be reserved yearly on such lease. Such leases must not be made without impeachment of waste. These are the guards imposed by the statute (which was avowedly made for the security of farmers and the consequent improvement of tillage) to prevent unreasonable abuses, in prejudice of the issue, the wife, or the successor, of the reasonable indulgence here given.

Next follow the disabling or *restraining* statutes, made entirely for the benefit of the successor; from which we may collect, that all colleges, cathedrals, and other ecclesiastical or eleemosynary corporations, and all parsons and vicars, are restrained from making any leases of their lands, unless under the following regulations:—They must not exceed twenty-one years, or three lives from the making. The accustomed rent, or more, must be yearly reserved thereon. Houses in corporations, or market towns, may be let for forty years; provided they be not the mansion-houses of the lessors, nor have above ten acres of ground belonging to them; and provided the lessee be bound to keep them in repair: and they may also be aliened in fee simple for lands of equal value in recompence.

Where there is an old lease in being, no concurrent lease shall be made, unless where the old one will expire within three years. No lease (by the equity of the statute) shall be made without impeachment of waste. And, lastly, all bonds and covenants to frustrate the provisions of the statutes of 13 and 18 Eliz. shall be void.

* But now, by the 5 Geo. III. c. 17. a lease of tithes or other incorporeal hereditaments, alone, may be granted by any bishop, or any such ecclesiastical or eleemosynary corporation, and the successor shall be entitled to recover the rent by an action of debt, which (in case of freehold lease) he could not have brought at the common law.

EXCHANGES.

An exchange is a mutual grant of equal interests, the one in consideration of the other. The word "exchange" is so individually requisite and appropriated by law to this case, that it cannot be supplied by any other word, or expressed by any circumlocution. The estates exchanged must be equal in quantity, not of *value*, for that is immaterial, but of *interest*; as fee simple for fee-simple, a lease for twenty years for a lease for twenty years, and the like. And the exchange may be of things that lie either in grant or in livery. But no livery of seisin, even in exchanges of freehold, is necessary to perfect the conveyance: for each party stands in the place of the other, and occupies his right, and each of them hath already had corporeal possession of his own land. But entry must be made on both sides; for if either party die before entry, the exchange is void, for want of sufficient notoriety. And so also if two parsons, by consent of patron and ordinary, exchange their preferments; and the one is presented, instituted, and inducted, and the other is presented and instituted, but dies before induction; the former shall not keep his new benefice, because the exchange was not completed, and therefore he shall return back to his own. For if, after an exchange of lands or other hereditaments, either party be evicted of those which were taken by him in exchange, through defect of the other's title, he shall return back to the possession of his own, by virtue of the implied warranty contained in all exchanges.

PARTITION.

A partition is when two or more joint tenants, coparceners, or tenants in common, agree to divide the lands so held among them in severalty, each taking a distinct part. Here, as in some instances, there is an unity of interest, and in all an unity of possession; it is necessary that they all mutually convey and assure to each other the several estates which they are to take and enjoy separately.

RELEASES.

Releases are a discharge or conveyance of a man's right in lands or tenements to another that hath some former estate in possession. The words generally used therein are, "remised, released, and for ever quit-claimed." And these releases may enure, either by way of *enlarging an estate*; as if there be tenant for life or years, remainder to another in fee, and he in remainder releases all his right to the particular tenant and his heirs, this gives him the estate in fee. But in this case the re-lessee must be in possession of some estate for the release to work upon; for if there be lessee for years, and before he enters and is in possession, the lessor releases to him all his right in reversion, such release is void for want of possession in the re-lessee. Or by way of *pass-*

ing an estate, as when one of two coparceners releaseth all her right to the other, this passeth the fee simple of the whole. And in both these cases there must be a privity of estate between the releasor and lessee; that is, one of their estates must be so related to the other, as to make but one and the same estate in law. By way of *passing a right*; as if a man be disseised, and release to his disseisor all his right; hereby the disseisor acquires a new right, which changes the quality of his estate, and renders that lawful which before was tortuous and wrongful. By way of *extinguishment*; as if my tenant for life make a lease to A for life, remainder to B and his heirs, and I release to A: this extinguishes my right to the reversion, and shall enure to the advantage of B's remainder, as well as of A's particular estate. By way of *entry and feoffment*; as if there be two joint disseisors, and the disseisee release to one of them, he shall be sole seised, and shall keep out his former companion; which is the same in effect as if the disseisee had entered, and thereby put an end to the disseising, and afterwards had enfeoffed one of the disseisors in fee.

CONFIRMATION.

A confirmation is of a nature nearly allied to release. Sir E. Coke defines it to be a conveyance of an estate or right *in esse*, whereby a voidable estate is made sure and unavoidable, or whereby a particular estate is increased; and the words of making it are these, "have given, granted, ratified, approved, and confirmed." An instance of the first branch of the definition is, if tenant for life lease for forty years, and die during that term; here the lease for years is voidable by him in reversion; yet, if he have confirmed the estate of the lessee for years, before the death of tenant for life, it is no longer voidable, but sure. The latter branch, or that which tends to the increase of a particular estate, is the same in all respects with that species of release which operates by way of enlargement.

SURRENDER.

A surrender, or rendering up, is of a nature directly opposite to a release; for as that operates by the greater estate descending upon the less, a surrender is the falling of a less estate into a greater. It is defined a yielding up of an estate for life or years to him that hath the immediate reversion or remainder, wherein the particular estate may merge or drown, by mutual agreement between them. It is done by these words, "hath surrendered, granted, and yielded up." The surrenderor must be in possession, and surrenderee must have a higher estate, in which the estate surrendered may merge; therefore tenant for life cannot surrender to him in remainder for years. In a surrender there is no occasion for livery of seisin; for there is a privity of estate between the surrenderor and the surrenderee; the one's particular estate and the other's remainder are one and the same estates;

and livery having been once made at the creation, of it, there is no necessity for having it afterwards. And, for the same reason, no livery is required on a lease or confirmation in fee to a tenant for years or at will, though a freehold thereby passes; since the reversion of the lessor, or confirmor, and the particular estate of the lessee, or confirmee, are one and the same estate; and where there is already a possession, derived from such a privity of estate, any farther delivery of possession would be vain and nugatory.

ASSIGNMENTS.

An assignment is properly a transfer or making over to another of the right one has in any estate; but it is usually applied to an estate for life or years. And it differs from a lease only in this; that by a lease one grants an interest less than his own, reserving to himself a reversion; but in assignments he parts with the whole property.

With respect to where the assignee is bound by the covenants of the assignor, and where he is not: the general rule is, that he is bound by all covenants which run with the land; but not by collateral covenants, which do not run with the land. As if a lessee covenant for himself, executors, and administrators, concerning a thing not in existence, as to build a wall upon the premises, the assignee will not be bound: but in that case the assignee will be bound, if the lessee have covenanted for himself and assigns. Where the lessee covenants for himself, his executors, and administrators, to reside upon the premises, this covenant binds the assignee; for it runs with, or is appurtenant to, the thing demised. The assignee in no case is bound by the covenant of the lessee to build a house for the lessor any where off the premises, or to pay money to a stranger. The assignee is not bound by a covenant broken before assignment. But if an underlease be made even for a day less than the whole term, the underlessee is not liable for rent or covenants to the original lessee, like an assignee of the whole term.

An assignee is liable for rent only whilst he continues in possession under the assignment. And he is held not to be guilty of a fraud, if he assign even to a beggar, or to a person leaving the kingdom, provided the assignment be executed before his departure.

DEFEAZANCE.

A defeazance is a collateral deed made at the same time with a feoffment or other conveyance, containing certain conditions, upon the performance of which the estate then created may be defeated, or totally undone.

BONDS AND RECOGNIZANCES.

Before we conclude the subject of conveyances, we shall make a few remarks upon such deeds as are used, not to convey, but to

charge or incumber lands, and to discharge them again; of which nature are obligations, or bonds, recognizances, and defeazances upon them both.

An *obligation*, or *bond*, is a deed, whereby the obligor obliges himself, his heirs, executors, and administrators, to pay a certain sum of money to another at a day appointed. If this be all, the bond is called a single one, *simplex obligatio*: but there is generally a condition added, that if the obligor do some particular act, the obligation shall be void, or else shall remain in full force; as, payment of rent; performance of covenants in a deed; or repayment of a principal sum of money borrowed of the obligee, with interest, which principal sum is usually one half of the penal sum specified in the bond. In case this condition be not performed, the bond becomes forfeited, or absolute at law, and charges the obligor while living; and after his death the obligation descends upon his heir, who (on defect of personal assets) is bound to discharge it, provided he has real assets by descent as a recompence. So that it may be called, though not a *direct*, yet a *collateral* charge upon the lands.

If the condition of a bond be impossible at the time of making it, or be to do a thing contrary to some rule of law that is merely positive, or be uncertain, or insensible, the condition alone is void, and the bond shall stand single and unconditional; for it is the folly of the obligor to enter into such an obligation, from which he can never be released. If it be to do a thing that is *malum in se*, the obligation itself is void, for the whole is an unlawful contract, and the obligee shall take no advantage from such a transaction. And if the condition be possible at the time of making it, and afterwards become impossible by the act of God, the act of law, or the act of the obligee himself, there the penalty of the obligation is saved; for no prudence or foresight of the obligor could guard against such a contingency.

On the forfeiture of a bond, or its becoming single, the whole penalty was formerly recoverable at law: but here the courts of equity interposed, and would not permit a man to take more than in conscience he ought, *viz.* his principal, interest, and expences, in case the forfeiture accrued by nonpayment of money borrowed; and damages sustained, upon non-performance of covenants; and the like. And the like practice having gained some footing in the courts of law, the 5 & 6 Ann. c. 16. at length enacted, in the same spirit of equity, that, in case of a bond conditioned for the payment of money, the payment or tender of the principal sum due, with interest and costs, even though the bond be forfeited, and a suit commenced thereon, shall be a full satisfaction and discharge.

A *recognizance* is an obligation of record, which a man enters into before some court of record or magistrate duly authorized, with condition to do some particular act; as, to appear at the assizes, to keep the peace, to pay a debt, or the like. It is in most respects like another bond: the difference being chiefly this, that

the bond is the creation of a fresh debt, or obligation *de novo*: the recognizance is an acknowledgment of a former debt upon record, the form whereof is, "that A B doth acknowledge to owe to our lord the king, to the plaintiff, to C D, or the like, the sum of ten pounds," with condition to be void on performance of the thing stipulated; in which case the king, the plaintiff, C D, &c. is called the cognizee, as he that enters into the recognizance is called the cognizor. This, being either certified to, or taken by the officer of some court, is witnessed only by the record of that court, and not by the party's seal; so that it is not in strict propriety a deed, though the effects of it are greater than a common obligation, being allowed a priority in point of payment, and binding the lands of the cognizor from the time of enrolment on record.

A *defeazance* on a bond, or recognizance, or judgment recovered, is a condition which, when performed, defeats or undoes it, in the same manner as a defeazance of an estate before mentioned. It differs only from the common condition of a bond, in that the one is always inserted in the deed or bond itself, the other is made between the same parties by a separate, and frequently a subsequent deed. This, like the condition of a bond, when performed, discharges and disencumbers the estate of the obligor.

CHAPTER XII.

Of Wills and Testaments.

A **WILL** or testament is "the legal declaration of a man's intention of what he wills to be performed after his death."

The person who makes a will or testament is called a *testator*; he who dies without a will is termed in law an *intestate*.

A *will* and *testament*, strictly speaking, are not words of the same meaning. A will is properly limited to land, and a testament only to personal estate; and the latter requires executors, who are named, to take care and see it performed.

A gift of lands or tenements by will is called a *devise*; and the person to whom they are given, the *devisee*.

Wills disposing of lands are regulated by several acts of parliament, and are a conveyance unknown to the old common law, which permitted a man only to dispose of his goods or personal property; but, in course of time, the words became applied indifferently to a disposition of lands or goods, which are frequently and continually distributed and devised at the same time by the will.

A bequest of goods and chattels is termed a *legacy*; and the person to whom they are bequeathed, a *legatee*.

There are two sorts of wills or testaments: first, written; and secondly, verbal, or made by word of mouth. The latter is called a nuncupative will.

A *nuncupative* or *verbal* will, is where the testator, without any writing, declares his will before a sufficient number of witnesses: and this can extend only to personal estate; for no real estate can pass by the will, unless it be written and properly attested.

As these kind of wills are liable to great impositions, and may occasion many perjuries, they are not so common as they were formerly; they are much discountenanced by the 29 Car. II. c. 3. § 19. (commonly called the Statute of Frauds), which enacts, that, for the preventing of fraudulent practices, no nuncupative will shall be good where the estate thereby bequeathed shall exceed the value of 30*l.* that is not proved by the oath of three witnesses at the least, who were present at the time of pronouncing the same, and bid by the testator to bear witness that such was his will, or to that effect.

And by 4 Ann. c. 16. § 14. it is enacted and declared, that all such witnesses as are and ought to be allowed to be good witnesses upon trial at law by the laws and customs of this realm, shall be deemed good witnesses to prove any nuncupative will, or any thing relating thereto.

Also by the said above mentioned statute of 29 Car. II. c. 3. § 19. nor unless such nuncupative will were made in the time of the last sickness of the deceased, and in the house of his or her habitation or dwelling, or where he or she has been resident for ten days, or more, next before the making of such will, except where such person was surprised or taken sick, being from his own home, and died before he returned to the place of his or her dwelling.

That, after the expiration of six months after the speaking of the testamentary words, no testimony shall be received to prove any will nuncupative, except the said testimony, or the substance thereof, were committed to writing within six days after the making of the said will.

Nor shall such will be proved till fourteen days after the death of the testator, nor till process hath first issued to call in the widow or next of kin, to contest it if they think proper.

No written will shall be revoked or altered by any subsequent nuncupative one, unless the same be, in the life-time of the testator, reduced to writing, and by him read over and approved, and unless the same be proved to have been done by three witnesses at the least.

But any soldier, in actual military service, or any mariner or seaman being at sea, may dispose of his moveables, wages, and personal estate, as before the making of this act.

It seems necessary to repeat, that this will extends only to personal estate: that the testamentary words by which it is made

must be spoken with an intent to bequeath, not any loose idle words in the sick person's illness; for he must require the bystanders to bear witness of such his intention: that the will must be made at home, among his family and friends, unless by unavoidable accident, to prevent imposition from strangers: that it must be in his last sickness; for if he recover, he may alter his disposition, having time to make a written will: that it must not be proved after six months from the making, unless it were put in writing within six days from that time; nor yet too hastily, as not till fourteen days after the death of the testator; nor till legal notice hath been given to his widow, or the next of kin, that they may contest the same, if they should be so inclined.

It is not material in what matter or stuff, whether on paper or parchment, nor in what language, whether in Latin, French, Dutch, or any other tongues, or in what hand or letters, whether in secretary hand, Roman hand, or court hand, or in any other, a will be written, so that it be fair and legible, that it may be read and understood; neither is it material whether the same be written at large, or by notes, or characters usual or unusual, XX for twenty; or when the figure 1 is used instead of the letter A if it be usual in the testator's writing, or the like; for the will is good notwithstanding. So also, if some words be omitted, or an improper sentence used, when the intent and meaning is apparent; as, where a man says, "I make my wife of this my last will and testament," leaving out the word *executrix*, yet the will is good; and this shall be understood. But if it be so done as it cannot be read; or, by reading, the mind of the testator cannot be known: then the will is void and of no force, in like manner as a nuncupative will is when the words spoken are so ambiguous, obscure, and uncertain, that thereby the meaning of the testator cannot be known or understood.

No stamp is required till after the death of the testator.

By a will made with good advice, or by the assistance of a person sufficiently versed in the law, the testator's estate may be given and disposed of so as not to leave the least room for dispute or litigation; yet if the will be not made with good advice, it may be attended with as bad consequences as if the testator had died intestate, and left his estate to the disposition of the law.

It hath been presumed, that where a will has been made contrary to the interest and inclination of some of the testator's family or relations, it may, unknown to him, have been destroyed before his death, or concealed afterwards; and thereby, notwithstanding the care he may have taken to dispose of his estate and effects, the same have been left to the disposition of the law. For preventing such misfortunes, we may observe Lord Coke's advice, which is, to make two parts of the will, and to leave one part thereof in the hands of a friend: either of which parts may be proved, and hereby the testator's will may be secured; and if he should think proper to cancel it at any time before his death, this will not prevent or hinder him from so doing, no more than if there was only

one part. For the cancelling of one part, when the same is done with an intention to destroy the will, is as the cancelling of both, and a good revocation of the whole will.

Where the estate and effects are of any considerable value, this method of making the will in two parts, and leaving one part thereof with a friend, is commonly used.

Who are capable of making a Will.

All persons have full power to dispose of their property by will, unless under some special prohibition; and such prohibitions are generally upon three accounts; first, for want of a sufficient discretion in the person making the will; secondly, for want of sufficient liberty and free will; and thirdly, on account of criminal conduct.

1. In the first class of prohibitions are considered,

Infants, whose qualification arises from infancy, or being under the age of twenty-one years.

The law, however, allows that a male infant of the age of fourteen years or upwards, and a female of twelve years or upwards, are capable of making a will, respecting any goods, money, and other personal estate; but as the ecclesiastical court is the judge of every testator's capacity, and decides on disputes respecting the validity of wills relating to personal estates, the discretion of the person making the will may be disputed there, and his capacity of devising, whatever may be his age.

But no objection can be made to wills of infants above these ages disposing of personal estates, merely on account of their youth.

In reckoning the age of an infant, the day of the birth must be excluded.

If an infant has attained to the last day of fourteen or twelve years, the testament by him or her in the very last day of their several ages aforesaid, is as good and lawful as if the same day were already then expired.

An *idiot*, or natural fool, is one who, notwithstanding he may be of lawful age to make a will, yet has so little sense, as to be unable to number to twenty, or to tell his age, or to answer any common questions, by which means it may plainly appear that he has not reason to discern what is to his advantage or disadvantage; and who, from his want of natural parts, is incapable of being informed or instructed by any other; and such an idiot cannot, at any time, make a will or testament, nor dispose either of his lands or goods.

The disqualification of idiotcy is founded on the natural incapacity of such an one to exercise that degree of understanding which constitutes volition. An idiot, or natural fool, is one who has had no understanding from his birth, and is therefore deemed in law (founded on experience) never likely to attain any; for which reason, and to prevent their alienating their estates, and disinheriting their heirs, the 17 Edw. III. c. 9. directs, in affirm-

ance of the common law, that the king shall have ward of the lands of natural fools during their lives, taking the profits thereof, and providing them with necessaries; and, after the death of the idiot, shall render the estate to the heir at law.

Therefore if any one attempt to call in question, or overthrow the will, on account of any supposed madness or want of memory in the testator, he must prove such impediment to have existed previous to the date of the will; but people of mean understanding and capacities, neither of the wise sort nor the foolish, but indifferent betwixt both, even though they rather incline to the foolish sort, are not hindered from making their wills. The law will not scrutinize into the depth of a man's capacity, particularly after his death, if he was able to conduct himself reasonably in the common course of life; as it might be opening a wide door to support pretensions of fraud or imposition on the testator.

And if a person of sound mind make his will, this shall not be revoked or affected by his subsequent infirmity.

But a man is not an idiot, who has any glimmering of reason, so that he can tell his age, know his parents, or such like common matters.

And every person making a will is presumed to be of sound understanding, until the contrary be proved; so that the proof lies on the other side.

Persons grown childish, either through old age or any infirmity or distemper, are, during the continuance of such incapacity, incapable of making a will.

Lunatics, during their madness or insanity, cannot make a will or testament, nor dispose of any thing thereby, on account of their utter incapacity of knowing what they are doing. The law requires in the makers of wills, integrity, soundness, and sanity of mind; the health of the body only not being regarded.

Upon a proof of the testator's insanity, a will has been set aside after forty years' possession under it, and that to the prejudice of a purchaser.

But if a mad person have intervals of calm reason, and, during the time of such intervals, possess a sound and disposing memory and understanding, he may make his will, which will be good in law.

If a person of sound memory make his will, and afterwards become insane, this is no revocation of the will; yet a bill will not lie in the life-time of the lunatic, to establish the testimony of the witness *in perpetuum rei memoriam* to such a will.

But disabilities of infancy, insanity, idiocy, coverture, or duress, if existing at the time of making the will, render it absolutely void, and it cannot be validated by any confirmation of the testator after they are removed.

A *drunken man*, when so far intoxicated as to be deprived of his reason and understanding, cannot make his will during his drunkenness; for it is requisite, when the testator makes his will, that he should be of sound memory and understanding.

Persons who are *born blind, deaf, and dumb*, are incapable of making a will, so likewise are those who are only deaf and dumb by nature; unless it manifestly appear that such a person understands what a will means, and that he has a desire to make a will; for if he have such understanding and desire, then he may, by signs and tokens, declare his intentions,

A blind person may make a nuncupative or verbal will, by declaring his intentions before a sufficient number of witnesses; and he may also make a will in writing, provided such will be read to him before witnesses, and in their presence acknowledged by him for his last will; but if a writing should be delivered to a blind man, and he, not hearing the same read, acknowledge it for his will, this would not be sufficient; for it might happen, that if he had heard it, he would not have acknowledged it for his will.

2. Under the second head of persons incapable of making a will, are those who have not sufficient liberty and free will: married women come under this description.

A *married woman* (or a *feme covert*) is restrained and prevented from devising any land or real estate whatsoever; being particularly excepted out of the 34 & 35 Hen. VIII. c. 5. enabling other persons to dispose of their lands and tenements by will; and it is a general rule, that she cannot make any will, even of goods or personal estate, without the licence or consent of her husband; because, by the law, as soon as a man and woman are married, all the goods and personal estate, of what nature soever, which the wife had at the time of the marriage, or may acquire after, belong to the husband by force of the marriage, which empowers him to make such part of them his own as are not absolutely vested in him immediately by the marriage.

Yet, by the licence or consent of her husband, she may make a will, and dispose of goods and other personal effects; and it is therefore common for the husband, previous to his marriage, to covenant with the parents or friends of the intended wife to allow her the licence or privilege of making a will, and to dispose of money or legacies to a certain value; and to pay what she shall appoint, not exceeding such value: and in that case, if after the marriage, and during the continuation of it, she make any writing, purporting to be her will, and dispose of legacies to the value agreed on, though in strictness of law she cannot make a will without her husband, but only something like a will, yet this shall be good as an appointment, and the husband is bound, by his bond, agreement, or covenant, to allow the execution of it.

If a married woman's husband be banished beyond sea for life, she may make a will, and act in every thing as if she was unmarried, or as if the husband was dead.

It has been determined, that a married woman having any pin-money, or separate maintenance, may bequeath her savings out of such allowance by will, without any licence or consent of her husband.

And if she survive him, she shall have it herself, and the same will not be liable to her husband's debts.

If a woman make a will, and afterwards marry, and die during the life of her husband; yet, being at the time of her death incapable by law of devising, because her husband is then living, the will is void.

A will is rendered void, which is made by a person in consequence of any *threats* made use of to him, whereby he is induced, through fear of injury, to make such a will as he would not otherwise have wished to do.

But if the testator afterwards, when there is no excuse of fear, do ratify and confirm his will, the same is then good in law.

3. Criminal conduct occasions a third kind of disability.

Traitors, whose lands and tenements from the commission of the offence, and goods and chattels from the time of conviction, are forfeited to the king, have no longer any property in either.

Traitors are not only deprived of the privilege of making any kind of last will, from the time of being convicted and found guilty; but any will made before does, by reason of such conviction, become void, in respect both of goods and land.

A *felon*, or one guilty of petit treason, lawfully convicted, cannot make a will, or other disposition of goods or land, because the law has disposed thereof already, all his goods being forfeited to the king.

A pardon, however, restores him to his former estate and capacity of making a will.

A person who wilfully kills himself, called a *felon de se*, has also forfeited his goods and chattels to the king; but lands and other real estates, devised by him, are not subject to forfeiture, a suicide not being attainted as a felon.

Outlawed persons, being out of the protection of the laws, and their goods and chattels forfeited to the king, are consequently disabled to dispose of their personal property, so long as the outlawry subsists; but of their lands they may dispose by will, as they are not forfeited by outlawry.

What may be disposed of by Will.

All *personal estate*, as goods and chattels of every description, may be bequeathed by will; and not only those which a man possesses at the time of making his will, but those which he may afterwards acquire, will also pass.

Things in action, as debts and other moneys, &c. due to a man, but not in his possession, being personal property, may be disposed of by will, though by the common law they cannot be granted by deed in the party's life-time.

Where any one has money owing to him by mortgage, he may devise it to be paid when it becomes due.

The right of presenting to the next avoidance, or the inheritance of an *advowson* of a *benefice*, may be devised.

And a devise of the next turn, or presentation, carries the next

turn of presenting absolutely to the devisee, and not merely the right of getting himself presented.

If a man has agreed to purchase an estate, and the buyer and seller enter into articles for the purchase, and the buyer dies, having by his will devised the land so agreed to be purchased, before any deed to convey the same is made to him, the land will, in equity, pass to the devisee; the seller standing only as trustee for him, and whom he should appoint, till a regular conveyance be executed.

A lease for any term of years, determinable on a life or lives, that is, if such or such persons live so long, or a lease of 500 or 1000 years, or any other term absolute, may be given and disposed of by will, and are part of a man's personal estate.

Corn growing on the land of tenants for life, &c. at the time of his decease, may be bequeathed by will.

And by the 20 Hen. III. c. 2. the dower crops of widows may in like manner be bequeathed.

Bonds and obligations, and the like, and in general whatever will go to the executor of the deceased in right of his executorship, will pass by the testator's will.

If a man be possessed of land for the term of his life only, and the land after his death descend to his heir, yet he may devise the corn growing on the land at the time of his death away from the heir to some other person, although he has it not in his power to devise the land on which it grows.

So if a man have lands in right of his wife, or is tenant by the courtesy of lands, and sow them with corn, he may devise the corn growing on the lands at his death, and the devise is good, and the wife, though entitled to the land, shall not have the corn. If a man thus possessed of lands in right of his wife, let them to another, who sows the ground, and afterwards the wife dies, the corn not being ripe, yet in this case the person to whom the lands were let is entitled to the corn, and may devise it, notwithstanding his estate and interest in the land is determined.

Where two wills are made, and neither of them dated, the maker is declared to have died intestate, it being impossible to ascertain which was the last will.

As to *real estate*, by the 34 & 35 Hen. VIII. c. 5. and by virtue of the 11 Hen. II. c. 25. all persons (except married women, infants, idiots, and persons of nonsane memory) are empowered to dispose by will in writing of the whole of their landed property (except their copyhold tenements) to whom they think fit, unless it be to bodies corporate; and that even to the total disinherison of the heir at law, notwithstanding that erroneous opinion, which some entertain, of the necessity of leaving their heir a shilling, or some other express legacy, in order to disinherit him effectually.

But trees, and other things fixed to the freehold, or heir-looms, which by custom go to the heir with the house, are not devisable but by him who has the fee-simple.

Although the personal estate of the wife becomes the property of the husband immediately on marriage, as he is thereby enabled to make all debts due to her, and bonds for money given her before marriage, his own; yet, unless he recover such debts during the marriage, and renew the bonds, and take them in his own name, he has not such an absolute interest in them as to be able to devise them by his will, but they will, after his death, again become the property of his wife. But if a woman's fortune, or any part of it, consisted in bonds given her before marriage, and the husband on the marriage makes a settlement on her in consideration of such fortune, notwithstanding the bonds are not renewed during the marriage, yet the husband will be entitled to them, being in this sense considered as a purchaser for a valuable consideration; and he may devise them, or they shall go to his executor, even though the wife should survive him.

Where a man is entitled to an estate in reversion, expectant on the determination of another person's life, who holds the lands for his life or in tail, he may by his will dispose of this; and if the tenant in tail or for life die during the life-time of the testator, such lands, which will then come to his possession, will pass without any republication of the will; the reversion at the time of making the devise being a certain present interest, though it was to take place in future.

And as to the freehold estates held by one person during the life of another, styled estates *par autre vie*, or for the term of another's life, these are also devisable by will, by 29 Car. II. c. 3. § 12.

Where a person seised in fee of real estate, by her will, first made a disposition of her real estate to two persons for life, reserving a rent-charge out of the same, payable first to her uncle for life, and then to her heir-at-law for life, which, "together with the repairs during the term, should be considered as his rent for the said farm," and afterwards she proceeded to make a disposition of her personal property, and then bequeathed and devised "all the rest, residue, and remainder of her effects, wheresoever and whatsoever, and of what nature, kind, or quality soever, (except her wearing apparel and plate) to certain nephews and nieces, to be equally divided among them by her executors:" held, that the reversion in fee of the real estate did not pass by the residuary clause, but descended to the heir-at-law; although he had a rent-charge devised to him for his life out of the same estate in the hands of the tenant for life.

No provision being yet made with respect to copyhold estates, the power of devising is now indirectly exercised over those by an application of the doctrine of uses, similar to that which was anciently resorted to in respect to freehold lands; for the practice is, to surrender to the use of the owner's last will, and on this surrender the will operates as a declaration of the use, and not as a devise of the land itself.

Copyhold estates, or estates held by the copy of court-roll, are

not devisable, they being excepted out of the 29 Car. II. c. 24. which, by converting all other estates into socage tenure, rendered them devisable by the Statute of Wills.

The words in a will whereby persons may take an estate in fee-simple, fee-tail, or for a term of life only, are various; as in the construction of wills (which are to be so favourably expounded as to pursue, if possible, the will of the testator) the law many times dispenses with the want of words in devises that are absolutely requisite in all other instruments.

The usual words for conveying a fee-simple, either by deed or will, are, "heirs and assigns for ever;" but by a devise to a man "for ever," or to one "and his assigns for ever," or to one "in fee-simple," the devisee hath an estate of inheritance, although the devisor has omitted the legal words of inheritance.

And a devise of "all the rest, residue, and remainder of the devisor's lands, hereditaments, goods, chattels, and personal estate, his legacies and funeral expences being thereout paid," was held to convey the fee of all the devisor's real estate; as by the words of this devise all the legatees may call on the devisee for their demands; and therefore it must be taken to have been the devisor's intention to give the devisee wherewithal to pay them.

And it was said, such is the rule of law, that unless some words are used which the law considers sufficient to carry a fee, the devisor can only take an estate for life; though indeed slight expressions are sufficient to pass the inheritance, where the court think that such is the devisor's intention.

No technical words are necessary in a will to give a fee; but if any words are inserted, to effectuate which it is necessary that a fee should pass, that is sufficient.

An estate tail, the usual words for creating it, either by deed or will, are, the heirs of the body of the grantee, or devisee; as, suppose it to be created by will, "I give and devise to J. S. (or whoever he may be) and the heirs of his body;" but in a will an estate tail may be created by a devise to a man "and his children," or to a man "and his seed," though the word of procreation, *viz.* *body*, be omitted. And under a devise to "A for life, and after his decease to and amongst his issue, and in default of issue," then over to others named in the will, A takes an estate tail.

If I give lands to a man and his heirs male for ever, this is adjudged to be estate tale.

An estate for life may be; as where the estate was limited by will to A for life, remainder to his first and other sons in tail male, remainder to the use of all and every the daughters, &c. as tenants in common, and in default of such issue, to the use of the right heirs of the devisor." After the death of A without any son, an only daughter was held to take only an estate for life. And where a devise was of real and personal estate to the

wife for life, remainder to the testator's son, R. R. and his issue lawfully begotten, to be divided as he shall think fit; and if he should die without issue, remainder over: it was held, that R. R. took only an estate for life; that he had a power to divide; but if he did not so, there was an interest in his children that would entitle them to an equal division.

By a will, an estate may pass by mere implication without any express words to direct its course. As, where A devised lands to his heir at law, after the death of his wife; here, though no estate is given to the wife in express terms, yet she shall have an estate for life by implication; for the intent of the testator is clearly to postpone the heir till after her death; and if she does not take it, nobody else can. So also, where a devise is of black-acre to A, and of white-acre to B in tail, and if they both die without issue, then to C in fee; here A and B have cross remainders by implication, and on the failure of either's issue, the other or his issue shall take the whole; and C's remainder over shall be postponed till the issue of both shall fail. But, to avoid confusion, no such cross remainders are allowed between more than two devisees; and in general, where any implications are allowed, they must be such as are necessary (or at least highly probable,) and not merely possible implications.

Where it is intended a man should have only an estate for life, the usual method, both in deeds and wills, is to convey the estate by the words "during the term of his natural life;" and then, for preserving contingent remainders, to convey or devise the same to trustees. With respect to devises, though an express estate for life be given to the ancestor, with a limitation to the heir or heirs of his body, or his issue, yet regularly the ancestor takes an estate tail; and if a devise be to one for life, and afterwards a limitation, either immediate or mediate, to the heirs of his body, the devisee takes an estate tail, whereby a father, if not prevented, may secure the estate to himself, and deprive his children thereof.

In order to prevent an imposition in respect to the disposal of lands to charitable uses, which might arise in a testator's last hours, and in some measure from just political principles to restrain devises in mortmain, or the too great accumulation of land in hands where it lies dead, and not subject to change possessors, it is provided by an act (called the Statute of Mortmain,) that no manors, lands, tenements, rents, advowsons, or other hereditaments, corporeal or incorporeal, whatsoever, nor any sum or sums of money, goods, chattels, stocks in the public funds, securities for money, or any other personal estate whatsoever, to be laid out or disposed of in the purchase of any lands, tenements, or hereditaments, shall be given, limited, or appointed by will, to any person or persons, bodies politic or corporate, or otherwise, for any estate or interest whatsoever, or any ways charged or incumbered by any person or persons whatsoever, in trust or for the benefit of any charitable use whatsoever; but such gifts shall be

by deed indented, sealed, and delivered, in the presence of two or more credible witnesses, twelve calendar months at least before the death of such donor, and be enrolled in the high court of chancery within six calendar months after execution, and the same to take effect immediately after the execution, for the charitable use intended, and be without any power of revocation, reservation, or trust for the benefit of the donor. And all gifts and appointments whatsoever of any lands, tenements, or other hereditaments, or of any estate or interest therein, or of any charge or incumbrance affecting or to affect any lands, tenements, or hereditaments, or any personal estate, to be laid out in the purchase of any lands, tenements, or hereditaments, or any estate or interest therein, or of any charge or incumbrance affecting or to affect the same, or in trust for any charitable use whatsoever, made in any other manner than is directed by this act, shall be absolutely null and void. But the two universities, their colleges, and the scholars upon the foundation of the colleges at Eton, Winchester, and Westminster, are excepted out of this act; but with this proviso, that no college shall be at liberty to purchase more advowsons than are equal in number to one moiety of the fellows or students upon the respective foundations.

As real property, unless by the local custom of particular places, is devisable only by virtue of the statutes, it will be necessary, in order to discover how far the power of devising real estates extends, to take a view of those statutes. The 32 Hen. VIII. enacts, that all persons having (or which thereafter shall have) any manors, lands, tenements, or hereditaments, or any estate of inheritance holden by or in the nature of socage tenure (by which all lands except copyholds are now holden), shall have full and free liberty, power, and authority, to give, dispose, will, and devise, as well by his last will and testament in writing, as otherwise, all his said manors, lands, tenements, and hereditaments, or any of them, at his free will and pleasure.

And by the 34 & 35 Hen. VIII. c. 5. § 8. it is enacted, that the words, "estate of inheritance," mentioned in the 32 Hen. VIII. shall be taken to mean estates in fee-simple only. It then proceeds to enact, that all persons having a sole estate or interest in fee-simple, or seised in fee-simple, in coparcenary, or in common, of any manors, lands, tenements, rents, or other hereditaments, in possession, reversion, remainder, or of rents, or of services incident to any reversion or remainder, have full liberty, power, and authority, to give, dispose, will, or devise, to any person or persons whomsoever, by their last will and testament in writing, all their said manors, lands, tenements, rents, and hereditaments, or any of them, or any rents, commons, or other profits or commodities, out of the same, or any part thereof, at their own free will and pleasure.

An advowson has been held to be included under the word *tenement* mentioned in the above statutes, and is therefore devisable. As it is also under the word *hereditament*.

The next presentation to an advowson will likewise pass by the same word.

A donative has also been held to be devisable.

Rents are devisable, as well by 34 Hen. VIII. as also by custom; and when lands are devisable by custom, the rents issuing out of them are so too.

Tithes also, of which a man is seised in fee, may be devised, as coming under the denomination of hereditaments.

Manors are devisable by general custom, as well as by the statutes.

And franchises, if valuable, and not restrained to the person of the grantee and his heirs, are devisable; and though they are not valuable, they may pass as appurtenant to other things which are so.

An annuity in fee is also devisable.

Estates in fee-simple are said to be either in possession or in expectancy: they are in possession, where no intermediate estate subsists between the right to possess and the actual enjoyment itself; they are said to be in expectancy, when the actual interest and possession is deferred till the accomplishment of some other act. The first of these estates is devisable; but the second cannot be devised.

Reversions, being a present interest, though a degree removed from present enjoyment, are deemed fee-simple in possession, and are therefore devisable.

As are remainders, which stand in a similar predicament.

Contingent interests, that is to say, estates or interests limited to take place upon a precedent condition, though resting in mere possibility of taking effect, are also devisable.

Real property may pass under the description of "personal estates" in a will, it being manifest from the whole of the instrument, as by terms of direct reference to that description in ulterior dispositions of the same real property, that such was the deviser's intention.

But a man cannot by his will devise lands which he shall acquire after making his will, the will only operating on such lands as he is possessed of at the time of publishing it. And though a man, by express words in his will, give to another all the lands which he shall have at the time of his death, yet this devise will be good only as to such lands as he had at the time of making the will; and any land purchased afterwards will not pass by it, but go to the heir at law, unless the will be republished.

Who are capable of taking by Will.

Every person, not labouring under some legal disability, is capable of taking by will.

Coverture does not disable a woman to take a devise; for though at law she cannot take without the consent of her husband, the Court of Chancery will compel him to give his consent.

A married woman is not disabled from being a devisee to her

husband; for the reason in law, that a husband and wife are one person, does not hold in the case of a devise, which does not take effect till after his death.

A bastard, when born, is capable of taking by devise; and the lawful issue of a bastard is capable of inheriting, or taking by descent, or otherwise, such estate as the parent might die possessed of; but no person, except his wife or lawful issue, can claim any part of his estate, as kindred; for he can have no collateral kindred.

A devise to a bastard in the mother's womb, or before born, is void. Yet if the bastard be born at the time of making the will, whereby either real or personal estate is given to him, he is capable of taking it; but it is safe to describe the bastard in the will, as the natural son or daughter of A.B. (his mother), especially if he be a tender infant, that has not got a name by reputation.

A testatrix, of the name of Mary Smith, had, by her will, given legacies to several members of her family, upon trust for all and every child born in her life-time; one of these children was not in truth born, but was *en ventre sa mere*; and the question was, whether this child took under the description of a child born in her life-time? It had been decided by many cases, that if the words had been, "living at my death," the child so *en ventre sa mere* would have taken. Courts of justice had extended the ordinary meaning of the words on the principle, that such a child was clearly within the meaning and motive of the gift. The vice-chancellor, Sir John Leach, in deciding this cause, considered that the words, "born in my life-time," might be included in the above maxim, and therefore adjudged that the child was entitled to the advantages derived under the will of the testatrix.

Of the Execution of a Will.

It is enacted by the 29 Car. II. c. 3. (usually styled the Statute of Frauds and Perjuries) "that all devises and bequests of any lands or tenements, devisable either by common law, or by force of the Statute of Wills, or by that statute, or by force of the custom of Kent, or the custom of any borough, or any other particular borough, shall be in writing, and signed by the party so devising the same, or by some other person in his presence, and by his express direction, and shall be attested and subscribed, in the presence of the devisor, by three or more credible witnesses, or else such devises or bequests shall be utterly void and of none effect."

In the construction of the above act of parliament, it has been adjudged, that the name of the person making his will, written with his own hand, as "I, John Mills, do make this my last will and testament," is a sufficient signing, without any name at the bottom. But the safest way is to sign the name, not only at the bottom or end of the will, but at the bottom of each page or sheet

of paper, if the will contain more than one; and the witnesses to the will seeing the testator sign all the sheets, and put his seal (though that is not absolutely necessary in law) as well as his name to the last sheet, must write their names under the attestation in the last sheet only.

In general, however, the intention of the testator is so entirely regarded, that any kind of disposition, not expressly contrary to the rules of law, will constitute a valid devise.

It has been held, that sealing of a will is a signing within the Statute of Frauds and Perjuries.

In the construction of wills, it is an invariable rule, that a devise must be most favourably expounded, to pursue if possible the will of the testator, who, for want of advice or learning, may have omitted the legal and proper phrases: therefore many times the law dispenses with the want of those words in wills, which are absolutely requisite in all other instruments. And thus the fee simple of or entire property in land may be conveyed by will, without using those words of inheritance, and an estate tail may be given without the words of procreation, which are necessary to create those estates by deed; the intent of the deviser supplying that defect. And hence, where a title depends upon the words of a will, any dispute relative to it is as properly determinable in chancery, or by a court of equity, as before a judge and jury; there being no distinction between the rules of law and equity herein: for the will is construed in each court with equal favour and benignity, and expounded rather on its own particular circumstances, than by any general rules of positive law.

All the words of a will must be considered together, to find out the intention; and the intention must take place, unless contrary to the rules of law. The intention of the testator expressed in his will, if consistent with the rules of law, shall prevail. But these words, *if consistent*, &c. are applicable only to the nature and operation of the estate or interest devised, and not the construction of the words.

If the name of the testator be not actually written by himself, or by his direction (in case of his not being able to write), no intention to sign is sufficient, though attended with the strong circumstance of his having made an effort to do it: for, however willing the courts may be to construe wills in such a manner as to effectuate the intention of the testator, yet they cannot go so far as to give effect to a constructive signing, upon a presumed intention.

The attestation and subscription of the witnesses, in the presence of the testator, is required by the statute, principally with a view of putting a stop to the secret manner in which, previous to an intended fraud, wills were executed. But the business of the person attesting the execution of a will is not barely to witness the manual act of signing, but also to bear testimony of the sanity of the testator.

But a written will of goods and chattels is not altered by the

statute; and therefore it is not absolutely necessary to have any subscribing witnesses to it, witnesses subscribing their names being first introduced by the statute. And if a testament of chattels be written in the testator's own hand, though it have neither his name nor seal to it, nor witnesses present at its publication, it is good in law, if sufficient proof can be had that it is his hand-writing. And though written in another man's hand, and never signed by the testator, yet if proved to be according to his instructions and approved by him, it hath been held a good testament of the personal estate.

In what form or in what part of the will, the attestation is made, is of no consequence; it will be good, though each witness write his name on separate sheets of the will, and that although the sheets be not tacked together.

The signing of the testator must be accompanied with a publication, that is, a declaration that the instrument is his will.

But in the publication of a will it is not necessary that the witnesses should be made acquainted with its contents.

Though the witnesses must all attest the execution of the testator's will in his presence, yet it is not necessary that it be done in the presence of each other.

And though the statute requires that the witnesses to the will shall subscribe their names in the testator's presence (to prevent obtruding another will in the place of the true one), yet it is sufficient if the testator might see, it not being absolutely requisite that he should actually see them signing; for, at that rate, if a man should but turn his back, or look off, it might make the will void. And where the testator desired the witnesses to go into another room seven yards distant to attest his will, in which there was a window broken through, whereby he might see them, it was adjudged by the court to be a witnessing in his presence.

Where the testator owns his hand before the witnesses, who subscribe the will in the testator's presence, the will is good, though all the witnesses did not see the testator sign: and it is observable that the Statute of Frands does not say that the testator shall sign his will in the presence of three witnesses; but requires these three things: first, that the will shall be in writing; secondly, that it be signed by the testator; and, thirdly, that it should be subscribed by three witnesses in the presence of the testator.

It is necessary to be careful who are made witnesses to the will. And here the safest method is to call in *three* indifferent persons, if there is any devise of lands in the will, (otherwise if the whole will respects only personal estate, *two* will be sufficient), who have no legacy given them by the will or codicil which they are required to witness the execution of, and not being creditors, at least not considerable ones, to the person making the will; particularly if, as is often the case, the land is made subject by the will to the payment of debts. For, by 25 Geo. II. c. 26. if any person who has a legacy left him by will is a witness to that will, he loses the legacy, it being made absolutely void.

Of revoking or annulling a Will; and of a Republication.

Though a man may have made his last will and testament, and declared it irrevocable in the strongest words, he is still at liberty to revoke it.

A will may be revoked, either by some positive act of the testator, or by some act of a doubtful and equivocal import, furnishing only grounds to presume that the testator had such intention, which is an implied revocation.

By the Statute of Frauds it is enacted, that no devise in writing of lands, tenements, or hereditaments, or any clause thereof, shall be revocable otherwise than by some other will or codicil in writing, or other writing declaring the same, or by burning, cancelling, tearing, or obliterating the same, by the testator himself, or in his presence, and by his directions and consent; but all devises and bequests of lands and tenements shall remain and continue in force until the same be burnt, cancelled, torn, or obliterated, by the testator, or by his directions, in manner aforesaid, or unless the same be altered by some other will or codicil in writing, or other writing of the deviser, signed in the presence of three or four witnesses, declaring the same. And that no will in writing concerning any goods, chattels, or personal estate, shall be repealed; nor shall any clause, devise, or bequest therein, be altered or changed by any words or will by word of mouth only; except the same be in the life-time of the testator committed to writing, and, after the writing thereof, read to the testator, and allowed by him, and proved to be so done, by three witnesses at the least.

Of a revocation by some other will, &c. it has been determined that such other will must in all respects be a good and valid will, or it will not amount to a revocation of the former will.

With respect to the words of the statute, *burning, cancelling, &c.* it has been held, that these must be done with an intent to burn, &c. to effect a revocation; for if done by mistake, it is no revocation.

And upon the principle, that a revocation of a will depends upon the intention of the party, it has been held that the slightest tearing or obliterating is sufficient to revoke, when joined with a declared intent of annulling the devise.

A subsequent devise to another person, though he may be incapable of taking, is a revocation of a precedent devise to a person who is capable of taking, as it serves to shew the intent of the testator to revoke the first devise, though the second cannot take effect.

It often happens that there is a duplicate of a will made, and deposited in the hands of an executor or other person. In this case, a cancelling of that part of the will which is in the possession of the testator is a sufficient revocation of both the parts, as well that in his own hands as the duplicate in the hands of the executor; they being both, in fact, but one will. But it is best that such

cancelling should be before witnesses. And so if a testator make a second will, and duly execute the same, it shall, without any thing further, revoke, and make void the former will and duplicate.

Where a man having made a will, afterwards makes another inconsistent with it, without expressly revoking the former, this is a revocation in law; the fact of making a new will furnishing a necessary inference, that the testator had mentally revoked the old one.

If a person having made his will, by which he devises lands, make another will, duly executed, which by this means revokes the former, and then keep both wills by him, and afterwards cancel the latter will by cutting off his name and seal, or otherwise destroying the execution, and at his death both wills are found in his custody, the former will uncanceled; and the latter canceled; the former will shall, in this case, take effect, it being by the cancelling the latter rendered as valid as if no such second will had ever existed; but if the former will had been cancelled on making the second, and then the second had been cancelled, neither of them could take effect, and the party should be said to die intestate.

A codicil will be a revocation of the will, if inconsistent with it; but so far only as it is repugnant to the particular dispositions in the will, leaving it in all other respects undisturbed.

It has been determined, that, without an express revocation, if a man who has made his will afterwards marry, and have a child or children, this is a presumptive or implied revocation of his former will, which he made in his state of celibacy, as well to his real as his personal estate; and the above-mentioned statute does not extend to this case, but he shall be said to die intestate; the law supposing that he must mean to provide in the first place for his family, and distributing his estate for their benefit accordingly. This, however, being only a presumptive revocation, if it appear by any expression or other means, to be the intent of the testator that his will should continue in force, the marriage will be no revocation of it. As in the case where a man devised an estate to a woman, whom he afterwards married, and when he died she was with child of a son; yet the will was determined to be good, and not revoked by the marriage.

Though marriage and the having of children have been deemed a revocation of a will, yet it is only a presumptive revocation; for, as already observed, if it appear to be the intent of the deviser that his will should continue in force, the marriage will be no revocation of it.

If a man devise land to J. S. and afterwards bargain and sell it to another, though this be not enrolled within six months, according to the statute, consequently nothing can pass to the bargainee, yet this is a revocation of the will; because here is a solemn act done, which plainly shews the intention of the testator to countermand the will.

Thus, a specific devise of a lease for lives is revoked by a subsequent renewal; by the surrender of the old lease the testator is, in consideration of law, entirely divested of all his preceding interest, and consequently there remains none upon which the will can operate. And so of leases renewable on fines.

So, where a trustee devised by his will a leasehold estate under Magdalen College, Oxon, and, after the making of this will, before his death, renewed his lease, by surrendering the old one, and taking a new lease; determined by Lord Chancellor, that this was a revocation of his will. And though the testator, after the renewal, looking amongst his papers, had said, "This is my will," that was held to be no republication.

As the effect of a republication is to devise, and the statute says, that "all devises" of lands and tenements shall be in writing, &c. it must be construed to extend to republication; the same ceremonies therefore which are necessary in executing an original will, must be observed in the act of republishing it.

And such a republication has been held to supply any defect arising from an inability to devise at the time of making the original will; as where a person made a will of land during his minority, and re-executed it after he became of age, this was determined to have rendered the will valid.

In short, any acts or words of the testator, sufficient to authorize a fair presumption that he desired his will should remain, was at the common law, and still is, in respect of property not within the Statute of Frauds; a good republication.

A will as to the disposition of land, and in some other circumstances, takes effect, or is hindered from doing so, according to its date; and it may be necessary sometimes, on certain occasions, as after mentioned, to renew it as it were, or in fact to make a new will. And if the testator be exactly of the same mind, as to the method of the disposal of his property, and circumstances only require that the will should bear date at any particular time, the person who makes the will should call in three proper witnesses (agreeably to the foregoing directions), and before them declare the signature to be his hand-writing, and use the same forms as in the original execution. And the three witnesses must sign their names to such new will or republication, mentioning the date thereof.

The effect of a republication upon a will is, to give the words used therein the same operation as they would have had if the will had been made at the time of republication, and consequently to extend its operation to all property purchased subsequent to the will, that is conveyed by such words.

Of Codicils.

A codicil is a supplement to a will, or an addition made by the testator, annexed to, and to be taken as part of a testament; being for its explanation or alteration, or to make some addition to, or subtraction from, the former dispositions of the testator.

An executor cannot regularly be appointed by codicil, yet may be substituted according to the will of the testator.

A man may make divers codicils, and the first is of equal force with the last, if not contradictory to each other.

The law relating to codicils agrees in general with that which relates to wills and testaments : like those, it may be either written or verbal ; and where it is used for the purpose of devising real estates, it requires the same ceremonies to attend its execution as an original devise ; and the same latitude is admitted in its form and publication, when its object is the disposition of personal property only, as is allowed in an original testament. In some respects, however, they differ ; for though a man can regularly make but one will or testament, he may make codicils without number, and, unless contradictory to one another, they will all stand.

If codicils are regularly executed and witnessed, they may be proved as wills ; and so, if they are found written by the testator himself, they ought to be taken as part of the will, as to the personal estate, and proved in common form by witnesses to the handwriting of the person making the codicil, and by giving an account when, where, and how the same was found.

Where a testator leaves two wills, and it is uncertain, for want of dates, which was last made, they will both be void : but if the same thing happen with respect to two codicils, and the same thing is given by one codicil to one man, and by another codicil to another, they shall divide the thing between them.

Whenever a codicil is added to a will or testament, and the testator declares that the will shall be in force ; in such case, if the will happen to be void for want of the forms required by law in the execution or otherwise, yet it shall be good as a codicil, and shall be observed by the administrator.

And where there are two wills of different dates, the first is void ; but a former codicil will be void only so far as it is contradicted by the latter.

So again, where two legacies are given to the same person, one in the former, the other in the latter part of the same will, he shall take only one of them ; whereas, if they are given him by two codicils, or by a will and a codicil, they will both be effectual.

And the reason of this distinction is founded on the principle of a codicil's being a supplement to the will, the essential nature of which is (unless otherwise expressed) to be an addition to what has gone before.

CHAPTER XIII.

Of Legacies.

A LEGACY is a bequest or gift of goods and chattels by will or testament: the person to whom it is given is styled the *legatee*; and if the gift be of the residue of an estate after payment of debts and legacies, he is then styled a *residuary legatee*.

This bequest transfers an inchoate property to the legatee; but the legacy is not perfect without the assent of the executor: for if one have a general or pecuniary legacy of 100*l.* or a specific legacy of a piece of plate, he cannot in either case take it without the consent of the executor. For in him all the chattels are vested; and it is his business, first of all, to see whether there is a sufficient sum left to pay the debts of the testator. But if there be a fund to pay the debts, and the executor then refuse his assent to the legacy, he may be compelled to give it, either by the spiritual court, or by a court of equity.

In case of a deficiency of assets, all the general legacies must abate proportionably, in order to pay the debts: but a specific legacy (of a piece of plate, a horse, or the like) is not to abate at all, or allow any thing by way of abatement, unless there be not sufficient without it. Upon the same principle, if the legatees have been paid their legacies, they are afterwards bound to refund a rateable part, in case debts come in more than sufficient to exhaust the residue after the legacies are paid.

If the legatee die before the testator, the legacy is a lost or lapsed legacy, and shall sink into the residue. And if a contingent legacy be left to any one, as *when* he attains, or *if* he attain the age of twenty-one, and he die before that time, it is a lapsed legacy. But a legacy to one *to be paid* when he attains the age of twenty-one years, is a vested legacy; an interest which commences *in presenti*, although it be *solvendum in futuro*; and if the legatee die before that age, his representatives shall receive it out of the testator's personal estate at the time that it would have become payable in case the legatee had lived. This distinction is borrowed from the civil law; and its adoption in our courts is not so much owing to its intrinsic equity, as to its having been before adopted by the ecclesiastical courts. For since the chancery has a concurrent jurisdiction with them in regard to the recovery of legacies, it was reasonable there should be a conformity in these determinations, and that the subject should have the same measure of justice in whatever court he sued. But if such contingent legacies be charged upon a real estate, in both cases they shall lapse for the benefit of the heir; for with regard to devises affecting lands, the ecclesiastical court has no concurrent jurisdiction. And in

case of a vested legacy due immediately, and charged on land, or money in the funds, which yield an immediate profit, interest shall be payable thereon from the testator's death; but if charged only on the personal estate, which cannot be immediately got in, it shall carry interest only from the end of the year after the death of the testator.

Besides these formal legacies contained in a man's will and testament, there is also permitted another death-bed disposition of property, which is called a donation *causâ mortis*, a gift in prospect of death. This gift, if the donor die, needs not the assent of the executors; yet it shall not prevail against the creditors: and is accompanied with this implied trust, that if the donor live, the property thereof shall revert to himself, being only given in contemplation of death, *mortis causâ*.

As this donation may be avoided by creditors, so it may by the wife and children of a freeman, if it break in on their customary shares.

Who may be Legatees.

When legacies are given to children, payable at a future period, all the children who are alive at the time of the distribution, whether born after or before the testator's death, are entitled to shares of the legacy, provided they are in *esse* at the time appointed for the distribution of the legatory fund.

But a bequest to natural children will extend only to those who are in *esse* at the date and making of the will. Neither will a bequest to "children" generally, enable a natural child to take under a will, unless particularly named by the testator, and manifestly and incontrovertibly intended.

When a legacy is, in all its consequences, to take effect immediately, and be distributable on the testator's death, the persons only who are described as legatees at that time, or who are in *esse* within the year after the testator's death, will be entitled to shares in the bequest.

If the person described and intended to take a testamentary gift on the death of another person, to whom it is given for life, or for a determinate period, be not in existence at the arrival of the time appointed for its vesting in him beneficially, and there are other executory limitations of the same property, it seems, that although such person should be born after that period last mentioned, he will not be permitted to claim the legacy, but it is to be divided among those capable of taking, when by the tenor of the will the testator intended the property to vest in possession; for the law will not suspend the rights of the subsequent legatees, on account of the possibility of a person, named as a prior legatee, coming into existence, who might answer the description, but who was not living, and therefore incapable of accepting the bequest at the period intended by the testator.

The admission of parole evidence, to explain doubts and difficulties in wills, is jealously admitted in courts of justice. In cases,

however, of wrong or imperfect descriptions of legatees, and to ascertain legatees whose names have been mis-spelt or mistaken, such evidence has been admitted. So, where only a part of the name or description has been omitted, parole evidence is let in to explain the testator's intention. But if there be an entire omission of the legatees' name or description, parole evidence cannot be admitted to supply the defect, and to ascertain the legatee.

An inaccurate description or addition of a legatee, correctly named, will not destroy the effect of a legacy given to him by nomination; but the wrong description or addition will be rejected. But if the erroneous description be applicable to another person, so as to render it doubtful whether the person named or the person described is entitled, the bequest will be void for uncertainty; for heirs at law are not to be disinherited by conjecture, but only by express words, or by implication.

Of Pecuniary Legacies.

If a parent, or a person *in loco parentis*, give an immediate advancement or provision to a child before provided for by the will of the parent or of such person, such advancement or provision will amount to an ademption or satisfaction of the legacy given by the will. But the ademption or satisfaction being merely presumptive, parole evidence (if clear and indisputable, and not founded on mere conjecture or probability) is competent to rebut the presumed satisfaction.

And if the legacy and advancement be not *ejusdem generis*, the latter will be no ademption of the former; as if the bequest were pecuniary, and the advancement by grant of a beneficial lease.

Of Vested Legacies.

When a legacy is given to A, *to be paid*, or *payable at*, or *when* he shall attain the age of twenty-one, or any other determinate period, the legacy will be considered as vested in A immediately; and therefore if A should die before the day of payment, his assignee or personal representative will be entitled to the legacy. For the legacy is considered as vesting *in præsentia*, and the period mentioned as referring to the legacy is not a condition, but the time when the party should be put into complete possession; unless the time appear to have been fixed by the testator as absolutely necessary to have arrived before any part of his bounty can attach to the legatee. But if it appear, that the testator intended the time as a condition precedent upon which the legacy must take place, then if such condition or contingency do not happen, the gift never arises. And therefore, when the time appointed for payment is annexed to the legacy; as, if I bequeath to A 100*l.* *at*, or *of*, or *when*, or *provided* he attains twenty-one, or on the day of his marriage, if he die before he arrives at that age, or is married, it is a lapsed legacy.

Though in a bequest of personality, the insertion of the words "payable" or "paid" have the effect of immediately vesting the

legacy, and the omission of them the contrary effect : yet no such distinction prevails in legacies originally payable out of, or chargeable upon, real estate ; for the whole condition upon which the legacies were given are required to be complied with, *viz.* the attainment of the devisee or legatee at the age of twenty-one, &c. admitting of no exception. But where the legacies are charged both upon the real and personal estate, if the legatee die before the time of payment, the legacy will sink into the land in all cases where it would be held to sink if the fund consisted of real estate only ; and it will be considered as vested with regard to personal estate, in all cases in which the same would be so adjudged if the fund consisted of personal property only.

But when the postponing of the time of payment of a legacy has been owing to the circumstances of the testator's estate, and not to the circumstances of the legatee, the representatives of the legatee who died before the time of payment may recover the legacy.

Of Legacies upon Condition.

Legacies upon condition are divided into conditions *precedent* and conditions *subsequent*. The former must happen or be performed before the legacy can vest ; for the conditions being precedent, no interest vests prior to the performance of them : the latter, by non-performance, will defeat the legacy already vested.

Conditions which are impossible at the time of the creation, or which were good at the commencement, but become impracticable by a subsequent event, as by the act of God, or of the testator, or which are repugnant to the nature and enjoyment of the bequest, or are contrary to law, are void, and the grantee is excused from the condition. But it must be observed, that the effect of these conditions in relation to legacies is not always the same ; for if the condition be precedent, that is, if it be to be performed before the legacy vests in interest, although the condition be void, from the impracticability or unlawfulness of the performance, yet as the legacy is only given upon the terms of complying with the condition, the legacy, as depending upon it, must also be void. In all cases, however, of the event or condition becoming impossible, if the condition be subsequent, the legacies will become absolute, as given upon an impossible condition.

Legacies given to persons, with a condition not to dispute the validity or bequest of wills and testaments, are not obligatory ; so that if there exist *probabilis causa litigandi*, an endeavour to set them aside will be no forfeiture.

Restraints upon marriage being prejudicial to society, in preventing the propagation of the species, personal legacies given on condition not to marry generally, or not to marry without the consent of other persons, without restriction as to time, will be considered absolute, *viz.* discharged from such conditions, whether precedent or subsequent.

But although such conditions as restrain marriage generally are void, yet conditions which restrain marriages to particular persons, or not with particular persons, or from marrying under twenty-one, or if under twenty-one within any other reasonable time, with the consent of parents, trustees, or guardians, are good conditions; for in these instances the liberty of marriage is not absolutely taken away, but only a qualification imposed, which may be expedient.

A condition by a husband, that his wife should be entitled to the bequest he has left her only so long as she continued his widow, is good.

Of the Payment and Appropriation of Legacies.

If the will appoint no time for the payment of legacies, they must in general be paid out of the testator's assets within the expiration of a year after his death; and if no fund be assigned for the purpose, they must be paid in the currency of that country where the will was made.

If an executor pay a legacy given to an infant to the infant himself, or to another person, during his minority, he will be compelled to pay it over again; unless the infant legatee, on attaining his full age, ratify such payments or advancements.

Where the executor or trustee is not empowered, under the trust reposed in him, to apply more than the interest of legacy for the maintenance of the legatee, he will not be allowed any payments made for the benefit or advancement of such infant legatee, except for express necessities; and not even for these, if he apply the principal or capital, or even a part of it. But if an executor do, without application, what a court of equity would have approved, he will not be forced to undo it, merely because it was done without application.

Legacies bequeathed to married women ought, in general, to be paid to their husbands; but the executors may withhold the payment of such legacies until the husband consent to a suitable settlement or provision on the wife, unless the wife consent in court, or, if abroad, before proper commissioners, to the payment of the legacy to the husband. But where a legacy is given to a married woman for her separate use for life, and after her decease according to her appointment by will, she has not such an absolute property in the legacy as to entitle her husband, by her consent, to the payment of it.

If a legacy be payable at twenty-one, and the legatee die before that period, his representative must wait for the legacy until the legatee, if living, would have attained twenty-one; but if the legacy be limited over to B, upon the event of the legatee's dying under twenty-one, and he die before that time, B will, immediately on his death, be entitled to demand payment of the legacy.

But if interest be given to the legatee during his minority, his representative may claim the legacy immediately. If the legacy

bear a less interest than the utmost use, the executor has a right to the use of the money, paying the modified interest.

Of the Abatement and Refunding of Legacies.

If a testator's assets be insufficient to pay both debts and legacies, the pecuniary legacies must abate proportionably *inter se*. But if an executor pay one legacy, as it is a presumption that he is possessed of assets sufficient to pay all the legacies, if solvent; he must make up the deficiency out of his own estate: and the court will not permit him to bring a bill to compel the legatee, whom he voluntarily paid, to refund; unless he has paid the legacy by compulsion, as where the legatee has recovered by decree; or unless debts, of which he had no notice before the legacies were paid, are claimed after the assets are distributed.

Though specific legacies are not compellable to abate on a deficiency of assets to pay general legacies, yet if all the personal estate not specifically bequeathed be exhausted in satisfying part of the testator's debts, or if the testator, in parcelling out the specific sum among the legatees, exceed the amount of it by mistake, or if the fund out of which the legacy is bequeathed is not in existence, the specific legatees will be obliged to abate proportionably *inter se*.

Of Lapsed Legacies.

It is a general rule, that if a legatee die during the life-time of the testator, the legacy given him shall lapse, or fall into the general personal estate of the testator, notwithstanding it be given to the legatee, his executors, administrators, or assigns; and parole evidence to shew that the testator was apprised of his death when he made his will, cannot be admitted. If, however, it appears that the words "executors and administrators" were used by the testator with the intention of substituting them in the place of the legatee in case of his death, they will not lapse.

But where a legacy is given in trust, though the trustee die before the testator, yet the legatees will be entitled to the legacy.

Of the Repetition of Legacies.

When legacies repeated in the same will are of equal amount, or the same *corpus* is given twice to the same person, and no additional cause is assigned for the second bequest, or any implication to shew, that the testator meant that the same thing, *prima facie*, should accumulate, the second legacy will not operate. But if the legacies differ in amount, or if either of them be contingent, such legacies will not be considered as merely repeated, but accumulative.

When legacies are given by will and codicil to the same person, whether of equal, greater, or less values, such legacies, if mentioned to be given for a particular reason or purpose, or if given by an additional description of the legatee, so as to par-

tionalize him as a peculiar object of favour, will, *impliciter* and *prima facie*, be considered as distinct gifts and accumulative, and not a substitution.

So if the provisions in the will and codicil are not *ejusdem generis*; as where one is given as a pecuniary legacy, and the other by way of annuity; or when the legacy by the codicil is given upon a contingency, and that in the will is absolute; both provisions must be satisfied.

The presumption, however, that legacies given by two instruments shall be additional and accumulative, may be repelled by parole evidence, shewing a contrary intention in the testator; but the *onus* of making such a proof is thrown upon the executor, and not upon the legatees. And if the codicil appear to be merely a simple repetition of the will, or if it appear that the latter instrument was made for the purpose of explaining or better ascertaining the legacies bequeathed by the former instrument, the presumption of accumulation will be repelled.

Of the Satisfaction of Debts and Portions by Legacies.

If a legacy bequeathed by a testator to his debtor be as much or more than the debt, the legacy will be considered as a satisfaction of the debt, unless expressly specified that the testator intended to give such legacy exclusive of the debt; and parole evidence will not be received to the contrary. But when there is no deficiency of assets, if the legacy be inferior in amount to the debt, the legacy will not be considered to be given in part payment or satisfaction of the debt.

When the debt and legacy are of equal amount, if there be a difference in the times of payment, so as the legacy may not be equally beneficial to the legatee as the debt, the legacy will not be a satisfaction of it.

So if a debtor bequeath to his creditor property of a different nature from that of which the debt consisted; or if the legacy be given on a contingency; or the legatee is entitled to a sum of money absolutely, and the testator bequeaths to him an equal sum for life only; equity will not deem the testamentary gift a satisfaction of the debt.

So if the debt be contracted by the testator subsequent to the making of his will, a legacy of equal value will not amount to a satisfaction of the debt.

And if a running account subsist between the testator and the legatee, the legacy will not be a satisfaction, if the testator's estate appear indebted on winding up the account.

For the law relating to *legacies to charitable uses*, see page 531.

Of Interest on Legacies.

If executors omit to pay legacies at the expiration of one year next after the death of the testator, the legatees will be entitled to interest from that period. And if the testator's intention appear favourable to the construction, a legacy will carry interest from his

death. So interest on specific legacies is to be computed from the death of the testator.

In the case of strangers, if a legacy be given absolutely, and payable at twenty-one, or at any other definite time, they will not be entitled to interest before the arrival of those periods.

But where devises in either of these cases are given to children, the court will direct interest to be computed on their legacies from the death of the parent.

But where a maintenance has been given by the parent, although less than the annual interest of the legacy, children will not be entitled to any further allowance.

With regard to the rate or quantum of interest to be allowed on legacies, when the amount has not been ascertained by the testator, no more than four per cent. will be allowed, whether the legacy were charged on real or personal estate.

Of the Construction of Bequests.

If a testator, in the disposition of his property, omit or neglect to provide for an intent, which, it is probable, he would not have omitted if the particular instance had occurred to him, or been mentioned to him, a court of justice cannot rectify the mistake by implying or inserting the necessary clause. But when a manifest and indubitable implication arises upon the face of the will, that a legatee should have his legacy on an event not accurately described, if the event happen, the defect will be supplied.

For further information on this head, see *Williams's Law of Wills and Testaments*.

Of Mistakes and Uncertainty in Bequests.

Though the subjects of bequests, when not properly described and ascertained, or when indefinite, are void for uncertainty; yet if the testator mistake the name only of the thing intended to be given, having no other thing to which the terms of the bequest can be applied, the wrong description of the bequest will not defeat the legacy.

If a person intend to give a legacy of a certain value, but, in enumerating the funds selected for payment of it, is mistaken in the exact amount of some of them, the legatee will notwithstanding be entitled to the sum actually intended.

Of the Executor's Assent to Legacies.

As the legal interest of the whole of the testator's personal property is vested in the executor by operation of law, the legatee cannot legally appropriate any part of the testator's assets in satisfaction of his legacy without such assent. And even where a testator forgives his debtor, or releases him from the money owing to the estate, yet such release or forgiveness, before it can take effect, will require the executor's assent.

An executor may assent before probate; and when there are two or more executors, the assent of any one or more of them

is sufficient. But executors cannot assent to legacies subject to revocation; nor can they conditionally, except the condition be precedent to the assent.

Very slight expressions by the executor will, however, be sufficient to constitute an assent. And if the executor allow the devisee of a term to receive the rents for a time only, or to apply the rents directed by the will to be applied for the devisee's maintenance during minority, it has been held an implied assent.

Although the assent of the executor be necessary to complete the title of the legatee, yet before such assent the legatee takes an inchoate right or interest in the subject of the bequest, which may be forfeited, and which will be transmissible to his personal representatives, in case of no disposition by will.

The assent of a married woman appointed executrix, without the privity and concurrence of her husband, is nugatory and ineffectual.

Of Residuary Estates.

When a residuary legatee is appointed by the testator, he will, in general, be entitled, not only to what remains after the payment of debts and legacies, but also to whatever may fall into the residue after the date and making of the will. But if it appear that the testator intended such legatee to have only what remained after payment of legacies, he will not, as residuary legatee, be entitled to any benefit from the lapses.

If no disposition be made of the residue, the executor will be entitled to it; and if no executor be named, it will be distributable among the testator's next of kin, according to the Statute of Distributions.

If the executor have a legacy, he is precluded from the undisposed residue, and is considered as trustee for the next of kin, even though the next of kin has been provided for by legacy.

But, in order to deprive executors of the undisposed residue, the legacies given to them must be of equal value; for an inference arises from the difference in value, that the testator only intended to prefer some of the executors to the others, and not to exclude them of any benefits to which they were legally entitled in the character of executors.

Where there are several executors, if legacies be given to two or more of them only, and no legacies to the others, the legacies so given will neither exclude the executors receiving them from participating of the undisposed residue with their co-executors, nor convert the executors into trustees for the next of kin.

So the law is the same, if an inference can be collected from the will, that by the legacy the testator did not mean to exclude the executor from taking the residue.

It also seems, that if a man appoint his wife executrix, and merely give as a legacy property of her own, to which she would have been entitled independent of the will, she will not be excluded from the undisposed surplus.

In all cases, where nothing more than office is conferred upon executors (as where they are expressly called executors in trust), or where a legacy is given to one of two executors for his share in seeing the will executed, or where the residue is expressly given to them, or some one of them, upon trust, they will be barred of the residue.

When the residue is originally and effectually given away from the executors, but the whole or some part of it becomes undisposed of by some subsequent event, the prior disposition will exclude the executors from such subsequent residue.

If the residue be expressly given to the executor for life, the gift will exclude him from taking any part of it absolutely.

CHAPTER XIV.

*Of Contracts.**

A CONTRACT, which usually conveys an interest merely in action, is thus defined: "an agreement, upon sufficient consideration, to do, or not to do, a particular thing." From which definition there arise three points to be contemplated in all contracts: the *agreement*, the *consideration*, and the *thing* to be done or omitted, or the different species of contracts.

First, then, it is an *agreement*, a mutual bargain, or convention; and therefore there must at least be two contracting parties, of sufficient ability to make a contract: as, where A contracts with B to pay him 100*l*. he thereby transfers a property in such sum to B; which property is, however, not in possession, but in action merely, and recoverable by suit at law.

This contract, or agreement, may be either express or implied. *Express* contracts are where the terms of the agreement are openly uttered and avowed at the time of the making; as, to deliver an ox, or ten load of timber, or to pay a stated price for certain goods. *Implied* are such as reason and justice dictate, and which, therefore, the law presumes that every man undertakes to perform; as, if I employ a person to do any business for me, or perform any work, the law implies that I undertook or contracted to pay him as much as his labour deserves.

A contract may be also either *executed*, as if A agree to change horses with B, and they do it immediately; in which case the possession and the right are transferred together: or it may be *executory*, as if they agree to change next week; here the right only vests, and their reciprocal property in each other's horse is not in possession, but in action. For a contract *executed* (which differs nothing from a grant) conveys a *chose in possession*; a contract *executory* conveys only a *chose in action*.

* Vide *Assumpsit*, page 45.

Having thus shewn the general nature of a contract, we are secondly to proceed to the *consideration* upon which it is founded, or the reason which moves the contracting party to enter into the contract. It must be a thing lawful in itself, or else the contract is void. A *good* consideration is that of blood, or natural affection between near relations; the satisfaction accruing from which the law esteems an equivalent for whatever benefit may move from one relation to another. This consideration may sometimes, however, be set aside, and the contract become void, when it tends in its consequences to defraud creditors or other third persons of their just rights. But a contract for any *valuable* consideration, as for marriage, for money, for work done, or for other reciprocal contracts, can never be impeached at law; and if it be of a sufficient adequate value, is never set aside in equity; for the person contracted with has then given an equivalent in recompence, and is therefore as much an owner, or a creditor, as any other person.

A consideration of some sort or other is so absolutely necessary to the forming of a contract, that a *nudum pactum*, or agreement to do or pay any thing on one side without any compensation on the other, is totally void in law; and a man cannot be compelled to perform it.

As, if a man promises to give another 100*l.* here there is nothing contracted for or given on the one side, and therefore there is nothing binding on the other. And however a man may or may not be bound to perform it in honour or conscience, which the municipal laws do not take upon them to decide, certainly those municipal laws will not compel the execution of what he had no visible inducement to engage for. But any degree of reciprocitry will prevent the pact from being nude; nay, even if the thing be founded on a prior moral obligation (as a promise to pay a just debt, though barred by the Statute of Limitations), it is no longer *nudum pactum*. And as this rule was principally established to avoid the inconvenience that would arise from setting up mere verbal promises, for which no good reason could be assigned, it therefore does not hold in some cases, where such promise is authentically proved by written documents. For if a man enter into a voluntary bond, or give a promissory note, he shall not be allowed to aver the want of a consideration in order to evade the payment; for every bond, from the solemnity of the instrument, and every note, from the subscription of the drawer, carries with it an internal evidence of a good consideration. Courts of justice will therefore support them both as against the contractor himself, but not to the prejudice of creditors, or strangers to the contract. It is to be observed, however, in promissory notes, that if an action be brought by the payee, the want of consideration will be a bar to the recovery; but an indorsee who has given full value for a bill of exchange may maintain an action against him who drew it, or he who accepted it, without any consideration.

We are next to consider the *thing agreed* to be done or omitted.

"A contract is an agreement, upon a sufficient consideration, to do, or not to do, a particular thing." The most usual contracts, whereby the right of chattels personal may be acquired, are, that of *sale or exchange*, that of *bailment*, that of *hiring and borrowing*, and that of *debt*.

SALE, OR EXCHANGE.

Sale, or exchange, is a transmutation of property from one man to another, in consideration of some price or recompence in value; for there is no sale without a recompence; there must be *quid pro quo*. If it be a commutation of goods, it is more properly an *exchange*; but if it be a transferring of goods for money, it is called a *sale*. But with regard to the *law* of sales and exchanges, there is no difference: we shall therefore treat of them both under the denomination of sales only; and shall consider their force and effect, in the first place where the vendor *hath* in himself, and secondly where he *hath not*, the property of the thing sold.

Where the vendor *hath in himself the property* of the goods sold, he hath the liberty of disposing of them to whomever he pleases, at any time, and in any manner, unless judgment has been obtained against him for a debt or damages, and the writ of execution is actually delivered to the sheriff. For then, by the Statute of Frauds, the sale shall be looked upon as fraudulent, and the property of the goods shall be bound to answer the debt, from the time of delivering the writ. Formerly it was bound from the *teste*, or issuing of the writ, and any subsequent sale was fraudulent; but the law was thus altered in favour of *purchasers*, though it still remains the same between the *parties*; and therefore if a defendant die after the awarding, and before the delivery of the writ, his goods are bound by it in the hands of his executor. If two writs are delivered to the sheriff on the same day, he is bound to execute the first which he receives; but if he levies and sells under the second, the sale to a vendor without notice of the first, is irrevocable, and the sheriff makes himself answerable to both parties.

If a man agree with another for goods at a certain price, he cannot carry them away before he hath paid for them; for it is no sale without payment, unless the contrary be expressly agreed. And, therefore, if the vendor says, the price of a beast is four pounds, and the vendee says he will give four pounds, the bargain is struck; and they neither of them are at liberty to be off, provided immediate possession be tendered by the other side. But if neither the money be paid, nor the goods delivered, nor tender made, nor any subsequent agreement be entered into, it is no contract, and the owner may dispose of the goods as he pleases. But if any part of the price be paid down, if it be but a penny, or any portion of the goods delivered by way of *earnest*, the property of the goods is absolutely bound by it; and the vendee may recover the goods by action, as well as the vendor may the price of them. Lord Holt has laid down the following rules; *viz.* That, notwith-

standing the earnest, the money must be paid upon fetching away the goods, because no other time for payment is appointed. That earnest only binds the bargain, and gives the party a right to demand; but then a demand without the payment of the money is void. That, after notice given, the vendor cannot sell the goods to another without a default in the vendee; and therefore if the vendee do not come and pay, and take the goods, the vendor ought to go and request him; and then if he do not come and pay, and take away the goods in convenient time, the agreement is dissolved, and he is at liberty to sell them to any other person." And such regard does the law pay to earnest as an evidence of a contract, that, by the 29 Car. II. c. 3. no contract for the sale of goods to the value of 10*l.* or more, shall be valid, unless the buyer actually receive part of the goods sold, by way of earnest on his part; or unless he give part of the price to the vendor, by way of earnest to bind the bargain, or in part of payment; or unless some note in writing be made and signed by the party, or his agent, who is to be charged with the contract. And with regard to goods under the value of 10*l.* no contract or agreement for the sale of them shall be valid, unless the goods are to be delivered within the year, or unless the contract be made in writing, and signed by the party or his agent, who is to be charged therewith.

It seems to be established, that contracts for goods which cannot be delivered immediately are not within the statute, and are binding without writing; as an agreement to take a carriage when it is built, or corn when it is threshed, and the like. And this is binding, though in fact the carriage be not delivered within the year. But if the original agreement were, that it should not at any event be delivered till after a year, then the contract will not be valid unless it be reduced into writing. But if the article exist at the time in a state fit for delivery, if the agreement be for more than 10*l.* it must be in writing, notwithstanding the delivery is to be postponed to a future day.

As soon as the bargain is struck, the property of the goods is transferred to the vendee, and that of the price to the vendor: but the vendee cannot take the goods, until he tenders the price agreed on. But if he tender the money to the vendor, and he refuse it, the vendee may seize the goods, or have an action against the vendor for detaining them. And by a regular sale without delivery, the property is so absolutely vested in the vendee, that if A sell a horse to B for 10*l.* and B pay him earnest, or sign a note in writing, of the bargain, and afterwards (before the delivery of the horse, or money paid) the horse dies in the vendor's custody, still he is entitled to the money, because by the contract the property was in the vendee.

But the property may also in some cases be transferred by sale, though the vendor *have none at all* in the goods; for it is expedient that the buyer, by taking proper precautions, may at all events be secure of his purchase; otherwise all commerce between

man and man must soon be at an end. And, therefore, the general rule of law is, that all sales and contracts of any thing vendible, in fairs or markets *overt* (that is, open), shall not only be good between the parties, but also be binding on all those that have any right or property therein. Market overt in the country is only held on the special days provided for particular towns by charter or prescription; but in London every day, except Sunday, is market-day. The market-place, or spot of ground set apart by custom for the sale of particular goods, is also in the country the only market overt; but in London every shop in which goods are exposed publicly to sale is market overt, for such goods only as the owner professes to trade in. But if my goods be stolen from me, and sold out of market overt, my property is not altered, and I may take them wherever I find them. And it is expressly provided by the 1 Jac. I. c. 21. that the sale of any goods wrongfully taken to any pawnbroker in London, or within two miles thereof, shall not alter the property; for this being usually a clandestine trade, is therefore made an exception to the general rule. And, even in market overt, if the goods be the property of the king, such sale (though regular in all other respects) will in no case bind him; though it binds infants, feme coverts, idiots, and lunatics, and men beyond sea or in prison; or if the goods be stolen from a common person, and then taken by the king's officer from the felon, and sold in open market; still, if the owner have used due diligence in prosecuting the thief to conviction, he loses not his property in the goods. So likewise if the buyer know the property not to be in the seller; or there be any other fraud in the transaction: if he know the seller to be an infant, or feme covert not usually trading for herself; if the sale be not originally and wholly made in the fair or market, or not at the usual hours; the owner's property is not bound thereby. If a man buy his own goods in a fair or market, the contract of sale shall not so bind him as that he shall render the price; unless the property had been previously altered by a former sale. And, notwithstanding any number of intervening sales, if the original vendor, who sold without having the property, come again into possession of the goods, the original owner may take them, when found in his hands who was guilty of the first breach of justice.

But there is one species of personal chattels in which the property is not easily altered by sale without the express consent of the owner, and those are horses. For a purchaser gains no property in a horse that has been stolen, unless it be bought in a fair or market overt, according to the direction of the 2 P. & M. c. 7. and 31 Eliz. c. 12; by which it is enacted, that the horse shall be openly exposed, in the time of such fair or market, for one whole hour together, between ten in the morning and sun-set, in the public place used for such sales, and not in any private yard or stable; and afterwards brought by both the vendor and vendee to the book-keeper of such fair or mar-

ket: that toll be paid, if any due; and if not, one penny to the book-keeper; who shall enter down the price, colour, and marks of the horse, with the names, additions, and abode of the vendee and vendor, the latter being properly attested. Nor shall such sale take away the property of the owner, if within six months after the horse is stolen, he puts in his claim before some magistrate, where the horse shall be found, and, within forty days more, proves such his property by the oath of two witnesses, and tenders to the person in possession such price as he *bonâ fide* paid for him in market overt. But in case any one of the points before-mentioned be not observed, such sale is utterly void; and the owner shall not lose his property, but at any distance of time may seize or bring an action for his horse, wherever he happens to find him.

A purchaser of goods and chattels may have a satisfaction from the seller, if he sell them as his own, and the title prove deficient, without any express warranty for that purpose. But with regard to the goodness of the wares purchased, the vendor is not bound to answer; unless he expressly warrant them to be sound and good, or unless he knew them to be otherwise, and have used any art to disguise them, or unless they turn out to be different from what he represented them to the buyer.

The following distinctions, which are laid down by Mr. Christian, in his notes on Blackstone, seem peculiarly referable to the sale of horses. If the purchaser give what is called a sound price, that is, such as from the appearance and nature of the horse, would be a fair and full price for it, if it were in fact free from blemish and vice, and he afterwards discover it to be unsound or vicious, and return it in a reasonable time, he may recover back the price he has paid, in an action against the seller for so much money had and received to his use, provided he can prove the seller knew of the unsoundness or vice at the time of the sale; for the concealment of such a material circumstance is a fraud, which vacates the contract. But if a horse be sold with an express warranty by the seller that it is sound and free from vice, the buyer may maintain an action upon his warranty or special contract, without returning the horse to the seller, or without even giving him notice of the unsoundness or viciousness of the horse; yet it will raise a prejudice against the buyer's evidence, if he do not give notice within a reasonable time that he has reason to be dissatisfied with his bargain. But the warranty cannot be tried in a general action of *assumpsit*, to recover back the price of the horse. In a warranty, it is not necessary to shew that the seller knew of the horse's imperfections at the time of the sale.

In sale of horses, it has been considered, that without a warranty of soundness by the seller, or fraud on his part, the buyer must stand to all losses arising from latent defects: the same has been held in the sale of hops.

BAILMENT.

Bailment is a delivery of goods in trust, upon a contract, express or implied, that the trust shall be faithfully executed on the part of the bailee. As, if cloth be delivered, or (in the legal dialect) bailed, to a tailor, to make a suit of clothes, he has it upon an implied contract to render it again when made, and that in a workmanlike manner. If money or goods be delivered to a common carrier, to convey from Oxford to London, he is under a contract in law to pay, or carry them to the person appointed. If a horse or other goods be delivered to an innkeeper or his servant, he is bound to keep them safely, and restore them when his guest leaves the house. If a man take in a horse, or other cattle, to graze and depasture in his grounds, which the law calls *agistment*, he takes them upon an implied contract to return them on demand to the owner. If a pawnbroker receive plate or jewels as a pledge or security for the re-payment of money lent thereon at a day certain, he has them upon an express contract or condition to restore them, if the pledger perform his part by redeeming them in due time. And so if a landlord distrain goods for rent, or a parish officer for taxes, these for a time are only a pledge in the hands of the distrainers, and they are bound by an implied contract in law to restore them on payment of the debt, duty, and expences, before the time of sale; or, when sold, to render back the overplus. If a friend deliver any thing to his friend to keep for him, the receiver is bound to restore it on demand. But such a general bailment will not charge the bailee with any loss, unless it happen by gross neglect, which is an evidence of fraud: but if he undertake specially to keep the goods safely and securely, he is bound to take the same care of them as a prudent man would take of his own.

In all these instances there is a special qualified property transferred from the bailor to the bailee, together with the possession. And, on account of this qualified property of the bailee, he may (as well as the bailor) maintain an action against such as injure or take away these chattels.

CHAPTER XV.

Of Bills of Exchange, Bank Notes, Bankers' Checks, &c.

BILLS OF EXCHANGE.

A BILL of exchange is defined by Blackstone to be "an open letter of request from one man to another, desiring him to pay a

sum named therein to a third person on his account, either at sight, or a certain number of days, after sight, or after date, or at single, double, or treble usance, or on demand."

These bills are either foreign or inland: *foreign*, when drawn by a merchant residing abroad upon his correspondent in England, or *vice versa*; and *inland*, where both the drawer and the drawee reside within the kingdom. Formerly, foreign bills of exchange were much more regarded in the eye of the law than inland ones, as being thought of more public concern than inland ones. But, now, by 9 & 10 W. III. c. 17. and 3 & 4 Ann. c. 1. inland bills of exchange stand nearly on the same footing as foreign ones; what was the law and custom of merchants with respect to the one, and taken notice of as such, is now by these statutes enacted with regard to the other.

The peculiar properties of a bill of exchange are, first, that it is assignable to a third person not named in the bill, or party to the contract, so as to vest in the assignee a right of action in his own name; which right of action no release by the drawer to the acceptor, nor set-off or cross demand due from the former to the latter, can affect. And, secondly, that although a bill of exchange be not a specialty, but merely a simple contract, yet it will be presumed to have been originally given for a good and valuable consideration.

Besides these privileges, to which a bill of exchange is entitled, a release by the drawer to the acceptor, or a set-off or cross demand due from the former to the latter, cannot affect the right of action of the payee or indorsee; whereas in most other *choses* in action, a release from the obligee, or a set-off due from him to the obligor, may be an effectual bar to the action.

Bills of exchange payable to order, are assignable by indorsement; but if payable to bearer, they are transferable by delivery without indorsement.

Of the Parties to a Bill of Exchange.

The person who makes or draws the bill is termed the *drawer*; he to whom it is addressed is, before acceptance, called the *drawee*, and afterwards the *acceptor*; the person in whose favour it is drawn is termed the *payee*, and when he indorses the bill, the *indorser*; and the person to whom he transfers it is called the *indorsee*; and, in all cases, the person in possession of the bill is called the *holder*. But, besides these immediate parties, a person may become a party to it in a collateral way: as where the drawee refuses to accept, any third party, after protest for non-acceptance, may accept for the honour of the bill generally, or of the drawer, or of any particular indorser; in which case an acceptance is called an acceptance *supra protest*, and the person making it is styled the acceptor for the honour of the person on whose account he comes forward; and he acquires certain rights, and subjects himself to nearly the same obligations, as if the bill had been directed to him. A person may also become party to

the instrument by paying it *supra protest*, either for the honour of the drawer or indorsers.

All persons, whether merchants or not, having capacity and understanding to contract, may be parties to a bill of exchange.

Corporations, by the intervention of their agents, may be parties to a bill of exchange. But by the 6 Ann. c. 22. § 9. and 15 Geo. II. c. 13. § 5. a restraint is imposed by the legislature as to the mode in which corporations (except the governor and company of the Bank of England) may draw bills; it having been enacted, "that it shall not be lawful for any body politic or corporate whatsoever, or for any other persons whatsoever, united or to be united in covenants or partnership, exceeding the number of six persons, in England, to borrow, owe, or take up any sum or sums of money, on their bills or notes payable on demand, or at any less time than six months from the borrowing thereof, during the continuance of the privilege of exclusive banking granted to the governor and company of the Bank of England.

An infant cannot bind himself by a bill or note drawn in the course of trade, nor can an action be supported against him on a bill or note given by him for necessities. But as the contract of an infant is only voidable, and not absolutely void, an express promise of payment, after he attains his full age, will render him liable. A bare acknowledgment, however, of the debt will not be sufficient confirmation; neither will a promise to pay a part, or actual payment of a part, create any further liability.

A feme covert cannot bind herself by drawing a bill of exchange, though she be living apart from her husband, and have a separate maintenance secured to her by deed. Where her husband is in legal consideration dead, as where he is transported, banished, and the like, she may contract so as to be liable in law.

But although no action can be supported on a bill drawn, indorsed, or accepted by a person incapable of binding himself, against such incapacitated person, yet it is nevertheless valid against all other competent parties thereto. Thus, in an action against the acceptor of a bill of exchange by the indorsee, it is no defence that the drawer, who indorsed the bill, was at that time an infant, or a feme covert; for though the holder is precluded from suing any anterior party, he will still be at liberty to sue any subsequent party to the bill.

Bills of exchange may be drawn, accepted, or indorsed, by the party's agent or attorney, who may be constituted by parole. In such case the principal is said to draw, accept, or indorse by procuration. And as this agency is a mere ministerial office, many persons, though incapable of contracting in their own right, may be agents for this purpose, such as infants, femes covert, persons attainted, outlawed, excommunicated, aliens, &c. But in such cases it is incumbent on the agent, if required, to produce his authority to the holder, and if he do not, the owner may treat that bill as dishonoured.

When a person has authority, as agent, to draw, accept, or indorse a bill for his principal, he must either write the name of his principal, or state in writing that he draws, &c. as agent; otherwise the act will not be binding on the principal. Besides, if an agent should accept a bill in his own name, which was directed to him personally, and not to his principal, although such direction described him in his official character, he will be personally responsible; unless in the case of an agent contracting on the behalf of government.

By the custom of merchants, where there are joint traders, and one of them accepts a bill drawn on them for himself and partner, or in his own name only, such acceptance binds the copartnership, if it concern the trade. But the acceptance of one of several partners, on behalf of himself and copartners, will not bind the others, if it concerns the acceptor only in a separate and distinct interest, and the holder of the bill, at the time he became so, was aware of that circumstance. If, however, the plaintiff be a *bonâ fide* holder, for a sufficient consideration, and had no such knowledge at the time he first became possessed of the bill, no subsequently acquired knowledge of the misconduct of the partner in giving such security, can disaffirm the act, but he may recover on such bill against all the partners.

But, after the dissolution of partnership, if a bill be sent into circulation, all the partners must join in the indorsement; for one of several copartners cannot, so as to bind the firm, put the partnership name on any negotiable security, even though it existed prior to the dissolution, or were for the purpose of liquidating the partnership debts, notwithstanding such partner may have had authority to settle the partnership affairs; it being a principle of law, that the moment the partnership ceases, the partners become distinct persons, and from that time they are tenants in common of the partnership property undisposed of. On the same principle, after a secret act of bankruptcy by one of two partners, the other cannot transfer the property in a bill which belonged to the firm before the bankruptcy: and the property in the bill can only be transferred by the respective indorsements of the assignees of the bankrupt partner and of the solvent partner.

If the members of a copartnership, each in his individual capacity, employ one factor, and he draws on all of them, and one accepts, the acceptance will not bind the rest.

If a bill be drawn on two persons, not being partners, and it be accepted by only one of them, it should be protested.

Of the Requisites of a Bill of Exchange.

In order to constitute a bill of exchange or promissory note, no particular form or precise words are necessary. An order or promise to deliver money, or a promise that I. S. shall receive money, or a promise to be accountable or responsible for it, will be a sufficient bill or note.

There are two principal qualities essential to the validity of a bill or note ; first, that it be payable at all events, not dependent on any contingencies, nor payable out of a particular fund ; and, secondly, that it be for the payment of money only, and not for the payment of money and performance of some act, or in the alternative. And if the bill or note be insufficient in its formation in either of these respects, it will not become valid by any subsequent occurrence rendering the payment no longer contingent. The following cases will illustrate these positions :—

Thus, an order or promise to pay money, “ provided the terms mentioned in certain letters shall be complied with ;” to pay a certain sum out of W. S.’s money as soon as you receive it ;” or, “ provided L. S. shall not pay the money by a particular day ;” or an order or promise to pay “ out of his growing subsistence ;” or to pay a sailor’s wages, “ if he do his duty as an able seaman ;” or a request to J. S. to pay a certain sum “ out of the moneys in J. S.’s hands, belonging to the proprietors of the Devonshire mines ;” or “ out of a named payment, when due ;” and the like ; is not, in either case, a bill or note, on account of the contingency to which the payment is subject. So an order from the owner of a ship to the freighter, to pay money “ on account of freight,” is not valid, because the quantity due on freight may be open to litigation.” Neither is a bill or note given for the delivery of horses and a wharf, and payment of money, on a particular day.

If, however, the event on which the payment is to depend must inevitably happen, it is of no importance how long the payment may be in suspense. And therefore if a bill be drawn, payable six weeks after the death of the drawer’s father, or payable to an infant when he shall come of age, specifying the day when that event shall happen, it will be valid and negotiable.

The statement of a particular fund in a bill of exchange will not vitiate it, if it be inserted merely as a direction to the drawee how to reimburse himself. And therefore where J. S. drew a bill on J. N. and directed him, one month after date, to pay A. B. or order a sum of money, “ as his quarter’s half-pay from the 24th June to 25th September next in advance ;” the bill was held to be valid, because it was not payable on a contingency, nor out of a particular fund, and was made payable at all events ; the mention of the half-pay being only by way of direction to the drawee, how he should reimburse himself.

Stamp-Duty.—A bill of exchange cannot be given in evidence, nor is it in any manner available, unless it be duly stamped, that is, not only with a stamp of the proper value, but also of the proper denomination.

Date.—Regularly the date of a bill of exchange ought to be clearly expressed at full length in words. But a date is not, in general, essential to the validity of a bill ; for when the date has been omitted, it will be intended to bear date on the day when it was made. By the 17 Geo. III. c. 20. however, all bills of exchange, or drafts in writing, being negotiable or transferable,

for the payment of twenty shillings, or any sum less than five pounds, or on which twenty shillings or less than five pounds shall remain undischarged, shall bear date before or at the time of drawing or issuing thereof.

Alteration.—If a bill, &c. after it has been drawn, accepted, or indorsed, be altered in any material respect, without the consent of the parties privy thereto, it will discharge them from all liability thereon, though the bill may afterwards come into the hands of an indorsee not aware of the alteration; and such alteration will have the same effect as to the drawer's liability on the original consideration. A material alteration, even by a stranger, will equally vitiate a bill. But a mere correction of a mistake, as by inserting the words "or order," in furtherance of the original intention of the parties, will not vitiate the bill, if made before the bill was circulated. So, if the alteration be not in the time of payment, &c. or other material part, the bill will not be affected by it.

In general, if a bill has been altered before acceptance or indorsement, the acceptor or indorsee cannot take any advantage of the alteration; and the consent of any one of the parties to the alteration will, in general, preclude him from objecting to it.

Of the person to whom the bill is made payable.—A bill of exchange or promissory note must regularly specify to whom it is to be paid: but if it be drawn payable to a fictitious person or his order, and indorsed in his name, by consent between the drawer and acceptor, it is in effect a bill payable to bearer, and may be declared on as such in an action by an innocent indorsee for a valuable consideration against all the parties who knew that the payee was a fictitious person. But, in the case of *Bennet v. Farwell*, it was held, that a bill of exchange made payable to a fictitious person or his order is neither in effect payable to the order of the drawer nor to the bearer, but is completely void; though, if money paid by the holder of such a bill as the consideration of its being indorsed actually get into the hands of the acceptor, it may be recovered back as money had and received.

Negotiability.—The negotiability of a bill of exchange depends on the insertion of sufficient operative words of transfer. The modes of making a bill transferable are, by making it payable to A or order, or A's order, or to A or bearer, or to bearer generally.

Value received.—It is not essentially necessary to insert the words "value received," they being implied in every bill and indorsement as much as if they had been expressed in *totidem verbis*. But, to entitle the holder of an inland bill or note (for the payment of 20*l.* or upwards) to recover interest and damages against the drawer and indorser, in default of acceptance or payment, these words should be inserted. 9 & 10 W. III. c. 17. 3 & 4 Ann. c. 9. § 4.

Consideration.—A bill of exchange is presumed to have been made upon a good and valuable consideration. But, between the drawer and acceptor, the drawer and payee and his agent, and the

indorsee and his immediate indorser, the legality, or want of consideration, or the insufficiency of the amount thereof, may be insisted on by way of defence to an action on the bill; and where a bill is for accommodation, and the holder has given value only for a part of the amount, he cannot recover upon the bill beyond that sum.

Wherever the defendant is at liberty to insist on the want of consideration as a defence, he may also insist that the consideration was illegal. In those cases, in which the legislature has declared that the illegality of the contract, or consideration, shall make the bill or note void, (*viz.* where it was made in consideration of signing a bankrupt's certificate, 5 Geo. II. c. 39. § 11. or for money lost in gaming,* &c. 9 Ann. c. 14. § 1; or for money lent on an usurious contract, 12 Ann. st. 2. c. 16; or for the ransom of a ship, 22 Geo. III. c. 25. § 2; or made, indorsed, &c. in France during the war, 34 Geo. III. c. 9. § 4.) the holder, notwithstanding he took the bill *bond fide*, and gave a valuable consideration for it, can only resort to the party from whom he received the bill, and from whom he can recover only on the original consideration. In cases, however, where the illegality of consideration is such as does not fall within the above-mentioned statutory prohibitions, the holder cannot be affected with the transaction between the original parties, unless he either had notice, or took the bill after it became due from a person who had notice of the illegal consideration on which the bill was given. And in general, where the bill is fair and legal in its reception, a subsequent illegal contract or consideration taking place on the indorsement, &c. will not invalidate it in the hands of a *bond fide* holder.

Where a new security is taken in lieu of another, void in respect of usury, &c. it will be equally invalid in the hands of the party to the first illegal transaction, but not in the hands of a *bond fide* holder.

Of the Acceptance.

Presentment for Acceptance.—When a bill is drawn payable within a certain time after sight, it is necessary, in order to fix the time when the bill is to be paid, to present it to the drawee for acceptance. In other cases, it is not essentially necessary for the holder to present the bill before it is due.

No particular time is fixed when a bill of exchange is to be presented for acceptance. The only rule, in all cases of bills of exchange is, that due diligence must be used and care taken that the bill be presented within a reasonable time.

Presentment should be made during the usual hours of business; but illness, or any other reasonable cause, will excuse a presentment within a reasonable time.

* It is held, that a bill of exchange founded on a gambling transaction is good in the hands of a *bond fide* holder; and by 58 Geo. III. c. 93. a bill of exchange or promissory note, although founded upon an usurious contract, does not vitiate the same in the hands of a *bond fide* holder, not knowing the usurious contract.

On the presentment of a bill, the drawee is entitled to keep it twenty-four hours in his possession after the presentment, for the purpose of examining whether he has any effects of the drawer's in his hands. But if he should require farther time, the holder should give immediate notice to the indorsers and drawer.

In all cases of presentment for acceptance or payment of a bill, it is incumbent on the holder to present it at the house of the drawee. If he have removed, the holder must use every reasonable endeavour to find out where he has removed, and make presentment there. In case of his decease, presentment must be made to his personal representative, if he live within a reasonable distance: but if, on inquiry, it appears that the drawee never lived at the place where the bill states him to reside, or that he has absconded, then the bill is to be considered as dishonoured.

Acceptance.—An acceptance may be either absolute or qualified. But whether absolute or qualified, is a question of law.

An *absolute* acceptance is an engagement to pay the bill according to the tenor. The most usual and formal method of making such an acceptance is, for the drawee to write on the bill the word "accepted," and subscribe his name; or to write the word "accepted" only; or merely to subscribe his name at the bottom or across the bill. For the convenience, however, of mercantile affairs, an acceptance, or promise to accept, by collateral writing or even by parole, is equally binding with an acceptance on the face of the bill. Any act indeed of the drawee, which demonstrates a consent to comply with the request of the drawee, will constitute an acceptance. A promise of this nature, "Leave the bill, and I will accept it," will amount to an acceptance, although the holder had no consideration for the promise. A direction to a third person to pay the bill, written thereon; or any other paper relating to the transaction, will amount to an acceptance. A verbal or written promise to accept at a future period a bill already drawn, or that a bill then drawn shall meet due honour, or shall be accepted, or certainly paid when due, amounts to absolute acceptance.

And although, regularly, a bill ought to be accepted before the day on which the money is to be paid, yet an acceptance after the day will bind the drawee: the drawer and indorsers are however discharged, unless due notice of non-acceptance, or non-payment at the time the bill became due, were given.

An acceptance may be implied as well as expressed; and this implied acceptance may be inferred from the drawee's keeping the bill a great length of time, or any other act which induces the holder not to protest it, or to consider it as accepted.

But a promise to accept a bill not in existence at the time the promise to accept was given, but which was to be drawn at a future time, has been held not to amount to an acceptance, unless it influence some person to take or retain the bill.

Nither will the expression, "There is your bill—all is right," amount to an acceptance, unless intended to induce the holder to conceive it as such. And if the drawee say, he cannot accept

without further direction from I. S. and I. S. afterwards desires him to accept, and draw upon A. B. for the amount, the mere drawing upon A. B. will not amount to an acceptance before the bill on A. B. is paid.

A *qualified* acceptance is when the drawee undertakes to pay the bill in any other manner than according to the tenor and effect thereof. This species of acceptance, if qualified with a condition, is called a *conditional acceptance*. The holder of the bill may consider a qualified acceptance as a nullity, and protest the bill for non-acceptance: but if he do receive it, he should, in order to bind the other parties to the bill, give immediate notice to them of the nature of the acceptance offered.

Any act which evinces an intention not to be bound, unless upon a certain event, is a conditional acceptance. Thus, an acceptance by the drawee of a bill, to pay "when goods consigned to him were sold; or, "upon account of the ship *Thetis*, when in cash for the said vessel's cargo;" or, "as remitted for;" or an answer, "that the bill would not be accepted till a money bill was paid;" have been held to be a conditional acceptance, and not to render the acceptor liable to the payment of the bill until the contingency has taken place; when such conditional acceptance will become as binding as an absolute one.

An acceptance may also be *partial*; as when the drawee undertakes to pay part of the sum for which the bill is drawn, or to pay at a different time or place. But in all cases of a conditional or partial acceptance, the holder should, if he mean to resort to the other parties to the bill in default of payment, give notice to them of such conditional or partial acceptance. And, in the like circumstances, the acceptor should be careful to express in the acceptance the condition he may think proper to annex; for if the condition be not expressed in a written acceptance, he will not be entitled to avail himself of it against any subsequent party between him and the person to whom the acceptance was given, who took the bill, without notice of the condition, and gave a valuable consideration for it. But if the agreement to accept be conditional, and a third person take the bill, knowing of the conditions annexed to the agreement, he takes it subject to those conditions.

If a bill be accepted payable at the house of the acceptor's banker, the party taking such special acceptance must present it for payment within the usual banking hours (which in London do not extend beyond five o'clock), at the place where it is made payable; if he present it after such hours without effect, it is no evidence of the dishonour of the bill, so as to charge the drawer.

By the 1 & 2 Geo. IV. c. 78. regulating the acceptance of bills of exchange, it is declared, that whereas, according to law as hath been adjudged, where a bill is accepted payable at a banker's, the acceptance thereof is not a general but a qualified acceptance; and whereas a practice hath very generally prevailed among merchants and traders so to accept bills, and the same have, among

such persons, been very generally considered as bills generally accepted, and accepted without qualification; and whereas many persons have been, and may be much prejudiced and misled by such practice and understanding, and persons accepting bills may relieve themselves from all inconvenience by giving such notice as hereinafter mentioned of their intention to make only a qualified acceptance thereof; it is therefore enacted, that if any person shall accept a bill of exchange, payable at the house of a banker or other place, without further expression to his acceptance, such acceptance shall be deemed and taken to be, to all intents and purposes, a general acceptance of such bill; but if the acceptor shall in his acceptance express, that he accepts the bill, payable at a banker's house or other place *only, and not otherwise or elsewhere*, such acceptance shall be deemed and taken to be, to all intents and purposes, a qualified acceptance of such bill, and the acceptor shall not be liable to pay the said bill, except in default of payment when such payment shall have been first duly demanded at such banker's house or other place. And no acceptance of any inland bill of exchange shall be sufficient to charge any person, unless such acceptance be in writing on such bill, or if there be more than one part of such bill, on one of the said parts.

In case of the failure of the drawer, the drawee ought not to accept bills after he is aware of that circumstance. But if the drawee, not having notice of the bankruptcy of the drawer, accept a bill drawn on him after such bankruptcy, he will be justified in paying his acceptance, although he has afterwards heard of the bankruptcy.

Liability of the Acceptor.—The acceptor of a bill of exchange, by reason of his acceptance, is, in case of its not being duly honoured, considered as primarily liable to all the parties to the bill; and an express agreement only will discharge him. It was formerly doubted, whether the drawer could maintain an action against the acceptor if he had been obliged to pay the bill. But in *Farminster v. Symons*, it was solemnly determined, that the drawer of a bill of exchange might maintain in his own name, and without an assignment from the payee, a special action on the case against the acceptor, and recover the money so paid; he having paid the bill, and the drawee having effects of his in his hands.

This obligation of the acceptor is in general irrevocable; for if the drawee of a bill put his name on it as acceptor, he cannot afterwards, even before it has been delivered to the payee, discharge his acceptance by erasing his name, unless such acceptance has been made by mistake.

Neither can the liability of the acceptor be released or discharged, otherwise than by payment, or express release, or by the Statute of Limitations. Thus, the holder of a bill of exchange, having been informed that the acceptor had not received any consideration for it, for several years after it became due received interest upon the bill from the drawer; but at length having commenced an action against the acceptor, it was held, that the action was maintainable, and that nothing but an express agreement

would discharge the acceptor, and that no indulgence to him or the drawer would have that operation.

A parole release of the acceptor's responsibility will be sufficient. But, to render this efficient, the words must amount to an absolute renunciation of all claim upon him in respect of the bill.

Non-Acceptance and Notice thereof.—If a bill be presented, and an acceptance refused, or a qualified acceptance only offered, or any other default made, after protest, due diligence must be used in giving notice thereof to all the parties to whom the holder means to resort for payment.

What is due diligence, is a question of law dependent on facts, viz. the situation of the parties, the place of their abode, &c. In case of a foreign bill, notice should be given on the day of the refusal to accept, if any post or ordinary conveyance sets out that day; and if not, by the next early ordinary conveyance.

Thus, in *Mullman v. D'Equino*, which was the case of a foreign bill of exchange drawn payable in the East Indies a certain time after sight, it was held, that it was not necessary to send notice of the dishonour by an accidental foreign ship which sailed thence, not direct for England; but that it was sufficient to have sent notice by the first regular English ship.

With respect to inland bills, not protested for non-acceptance, notice of the refusal to accept should, in all cases, be given at least within the course of the following day. And when an inland bill is protested for non-acceptance or non-payment, if the protest, or notice thereof, be not sent within fourteen days after it is made, the drawer or indorser will not be liable for damages, &c. under the 3 & 4 Ann. c. 9. § 5.

The rule which requires notice to be given within a reasonable time by the holder of a bill of exchange to the drawer, of the drawee's refusal to accept, is calculated for the benefit of the drawer, to enable him to withdraw his effects out of the hands of the drawee. On this rule, however, an exception has been engrafted, viz. that where the drawer has not any effects in the hands of the drawee at the time when the bill is drawn, it is not necessary to give such notice to him, because in this case he cannot sustain any injury from the want of such notice. But if the drawer have effects in the hands of the drawee at the time of drawing the bill, though it do not appear to what amount, and though such effects are withdrawn before the bill can be presented, the circumstance of there not being effects in the hands of the drawee at the time when the bill is presented for acceptance and refused, will not supersede the necessity of notice. In *Walwyn v. St. Quintin*, Eyre, C. J. said, "Perhaps, indeed, notice ought never to be dispensed with, since it is a part of the same custom of merchants which creates the duty; especially as the grounds for dispensing with it are such as cannot influence the conduct of the holder of the bill at the time when he is to determine whether he will or will not give notice; for ninety-nine times in an hundred he cannot know whether the drawer has or has not effects in the hands of the acceptor, or of him for whose ac-

commodation the bill was drawn." It has, however, been resolved in many cases, that where the drawer has had no effects in the hands of the acceptor, notice might be dispensed with. But it may be proper to caution bill-holders not to rely on it as a general rule, that if the drawer have no effects in the acceptor's hands notice is not necessary: the case of acceptance on the faith of consignments from the drawer not come to hand, and the case of acceptance on the ground of fair mercantile agreements, may be stated as exceptions; and there may possibly be many others.

Immediately on the receipt of the notice, each party should give a fresh notice to such of those parties who are liable over to him, and against whom he must prove notice.

With respect to the drawer, it has been observed, that want of effects in the hands of the drawee at the time of drawing the bill will supersede the necessity of notice; but with respect to the indorsers, as they have not any thing to do with the account between the drawer and the drawee, notice of non-acceptance must be given to them by the holder of the bill. It is to be observed, however, that the rule requiring notice to be given even to the indorser, is applicable only to fair transactions, where the bill has been given for value in the ordinary course of trade.

But though the neglect on the part of the holder to give immediate notice of non-acceptance discharge the parties entitled to insist on the want of it from their respective liabilities; yet the consequences of such a neglect may be done away by other circumstances. The absconding or absence of the drawer or indorser may excuse the neglect to advise him; and the sudden illness or death of the holder or his agent, or other accident, will be an excuse for the want of a regular notice to any of the parties, provided it has been given as soon as possible after the impediment is removed. So, want of notice may be excused by some act of the person entitled to insist on the want of it, which amounts to a waiver of the advantage which the law has given him; or, in case of a conditional acceptance, by the completion of those conditions before the bill becomes payable. Thus it has been held, that a payment even of part, or a promise to pay the whole, or to see it paid, or an acknowledgment that it must be paid, made by the person insisting on the want of notice, amounts to a waiver of the consequences of the *laches* of the holder, and admits his right of action. But the death, bankruptcy, or insolvency of the acceptor, or his being in prison, although within the knowledge of the drawer, will not supersede the necessity of notice of the dishonour of the bill; neither will the circumstance of the drawee's having informed the drawer, before the bill was presented for acceptance, or became due, that he could not honour it, be a sufficient excuse for not giving due notice.

A subsequent promise by the indorser, as we have just seen, is a waiver of the want of notice; but a subsequent proposal by the indorser to pay the bill by instalments, made without knowledge of all the circumstances relative to the bill having been dishonoured, has been held not be a waiver of the want of notice.

With respect to money paid under a misapprehension of legal liability, from the case of *Bilbie v. Lumley* and others, it appears, that money paid by one having knowledge, or the means of such knowledge in his power, of all the circumstances, cannot, unless there has been deceit or fraud on the part of the holder, be recovered back again on the account of such payment having been made under an ignorance of the law, although the party paying expressly declared that he paid without prejudice. However, payment made under a misapprehension of facts, and which there was no obligation to discharge, as where the holder had been guilty of *laches*, will not be binding; and may, if the party making it were prejudiced by the conduct of the holder, be recovered back.

If the party entitled to notice be a bankrupt, notice of the default of the drawee should be given to him or his assignees; if dead, to his executor or administrator. When the party entitled to notice is abroad at the time of the dishonour, it will be sufficient to leave notice of non-acceptance at his place of residence in England, and a demand of acceptance or payment from his wife or servant would in such case be regular.

With respect to the mode of sending notice, it seems that, in the case either of a foreign or inland bill, sending notice by the post, even though the letter containing such notice should miscarry, will be sufficient. But where it is necessary or more convenient for the indorsee to send notice by any other conveyance than the post, he may do so, and charge for the same. And in all cases where notice is sent from London by the general post, the letter containing the notice should be delivered at the General Post-Office in Lombard Street, or at least at a receiving-house appointed by that office.

In all cases of notice, notice to one of several parties is held to be notice to all; and if one of several drawers be also the acceptor, it is not necessary to give notice to the other drawers.

On refusal of acceptance, either wholly or partially, the holder may insist on immediate payment by all the parties whose names appear on the bill. And on this principle it was decided, that where the defendant, having been arrested, gave the plaintiff a draft for part of the money due, on which he was discharged out of custody, but the draft having been dishonoured, he was retaken upon the same writ, and the proceedings were held to be regular. In this case Lord Kenyon said, that in cases of this kind, if the bill which is given in payment do not turn out to be productive, it is not that which it purported to be, and that which the party receiving it expected, and therefore he may consider it as a nullity, and act as if no such bill had been given.

As to the party by whom the notice should be given, it appears, that in general the notice of non-acceptance or nonpayment should come from the holder. And therefore, where the indorser of a promissory note had, within a reasonable time after default of payment of the note, received notice thereof from the maker, but

the plaintiff (the holder) had not given the defendant (the indorser) notice until two days after the bill became due; it was held that the plaintiff could not recover, and that due notice ought to be given by the holder himself to the indorser within a reasonable time after default of payment; Mr. Justice Buller observed, that the purpose of giving notice to the indorser is not merely that the indorser should know that the note is not paid, for he is chargeable only in a secondary degree; but, to render him liable, you must shew that the holder looked to him for payment, and gave him notice that he did so. The notice by another person to an indorser can never be sufficient; but it must proceed from the holder himself.

Of the Protest.—If the drawee refuse to accept or to pay the bill when due, the holder, or (if he be ill or absent) some other person for him, should protest it. Foreign bills of exchange ought to be presented to the drawee by a notary public (to whom credit is given because he is a public officer), and acceptance demanded. If the drawee refuse to accept the bill, then the notary ought, within the usual hours of business, on the day when acceptance is refused, to draw a protest for non-acceptance. In case, however, there be not any public notary at the place where the bill is dishonoured, it may be protested by any substantial person of that place, in the presence of two or more witnesses. If a conditional or partial acceptance be offered, the protest should not be general, as otherwise it will release the acceptor from the effect of such acceptance.

At common law, no inland bill could be protested for non-acceptance; but by the 3 & 4 Ann. c. 9. § 4. it is enacted, “that, upon presenting such bills drawn for the payment of five pounds or upwards, in case the drawee should refuse to accept them by underwriting the same, the payee, his agent, &c. shall cause the same to be protested for non-acceptance, as in the case of foreign bills of exchange.” By the sixth section, this protest is directed to be made by such persons as are appointed by the 9 & 10 W. III. c. 17. to protest inland bills for nonpayment, viz. by a notary public, and, in default of him, by any substantial person of the place, in the presence of two or more credible witnesses. By the fifth section, when an inland bill is protested for non-acceptance, if the protest or notice thereof be not sent within fourteen days after it is made, the holder will not be entitled to the accumulative advantage of interest, damages, and costs.

The protest for non-acceptance in case of an inland bill is by no means necessary, and the want of it does not affect the holder's right to the principal sum, as it would in the case of a foreign bill of exchange. In practice it is seldom made: an inland bill is in general only noted for non-acceptance; but this, it has been said, is unknown in the law, as distinguished from the protest, and is merely a preliminary step to the protest, which it will not in any case supply the want of.

If a bill have been noted for non-acceptance on the day of re-

fusal, the protest may be drawn any day after by the notary, and be dated the day the noting was made.

If, after the acceptance, the drawee abscond, or become a bankrupt before the bill is due, it is said to be the custom of merchants for the holder to protest it, in order to have better security for the payment. But though the holder is entitled to make this protest, the drawers or indorsers are not compellable to give this security; in which case the holder, before he can sue them, must wait until the bill becomes due.

Of Acceptance supra Protest.—When a foreign bill is protested for non-acceptance, or for better security, the drawee may, if he do not choose to accept on the account of him in whose favour the bill is drawn, accept it *supra* protest, which is called an acceptance for the honour of the person on whose behalf it is made, and it enures to the benefit of all who become parties subsequently to that person.

If the drawee refuse to accept the bill, or abscond, or be incapable of making a contract, any other person may, without the consent of the drawers or indorsers, accept it for the honour of the bill, or of the drawer, or of any particular indorser; and even a bill previously accepted *supra* protest may be accepted by another person *supra* protest, in honour of some particular person.

Of the Indorsement and Transfer of Bills of Exchange.

Bills payable to order, or to bearer, are equally negotiable from hand to hand *ad infinitum*; and the transfer of them for a good and valuable consideration vests, in favour of commercial intercourse, a right of action in the assignee, sustainable in his own name.

But in general, unless the operative words of transfer, viz. "or order," "or bearer," or some other words authorizing the payee of a bill to assign it, be inserted therein, it cannot be transferred, so as to give the assignee a right of action against any of the parties except the indorser himself; unless the negotiable words were omitted by mistake. It is, however, not essential to the validity of a bill that it should contain negotiable words so as to render it transferable.

Any words or extraneous facts in a bill payable to a fictitious payee, from which an inference can be drawn, that the drawer, or any other party to the bill, intended it to be negotiable, will give it a transferable quality against that person. And in all cases, though no operative words of transfer are inserted in the bill, yet it will always have the same operation against the party making the transfer as if he had power to assign: for a transfer of a bill of exchange by indorsement is an act similar in effect to making a new bill; the obligation which it imposes on the indorser to the indorsee, and the mode in which that obligation may be extinguished by the holder's *laches* or otherwise, is in all respects exactly similar to that which the drawer of a bill is under to the payee.

As to the capacity of transferring a bill of exchange, it may be said in general, that a valid transfer can only be made by the payee; for if a bill payable only to bearer, or order, and indorsed in blank, is transferred, if the assignee, at the time of his becoming the holder, knew that the person making the transfer had no right to it, such transfer is inoperative, unless such assignee had no knowledge of such circumstance, and took the bill *bonâ fide*.

An infant payee cannot by indorsement raise any interest in the bill against himself, though a subsequent indorser may be liable. And where a bill has been made to a *feme covert*, or to a *feme sole* who afterwards marries, the right of transfer rests in her husband, and the indorsement must be in his name.

So in case of bankruptcy, the right of transfer is in general vested in the assignees from the time of the act of bankruptcy. But it has been held, that if a trader deliver a bill for a valuable consideration to another, previously to an act of bankruptcy, without indorsing it, he may indorse it after his bankruptcy.

In case of the bankruptcy of a factor or broker, bills remitted to them, and entered short, while unpaid, being considered in the nature of a deposit, must be returned by the assignees to the owner, subject to such lien as the factor or banker may have on them. And if payment be received upon such bills by the assignees, they must refund it to the owner.

Where a bill is transferred to several persons in partnership, the right of transfer is in all collectively, and not in any individually; the right, however, may be put in force by the indorsement of one partner.

An indorsement of a bill of exchange may be made at any time, either before it is complete, or after the time appointed for the payment of it. If it be indorsed before it is complete, as if a man indorse his name on a blank stamped piece of paper, it will have the effect of binding the indorser to the amount of any sum which may be inserted consistent with the stamp, and made payable at any date. If the indorsement take place after the time of the bill's becoming due, in order to make the transfer valid, the bill must remain unpaid by any of the parties.

Bills drawn for a less sum than five pounds cannot be indorsed after the time of their becoming due. 17 Geo. III. c. 30. § 1.

With respect to a transfer made before a bill is due, and one made when it is over-due, there is a material distinction. In the former case, the assignee is not bound to inquire into the circumstances existing between the assignor and any of the previous parties to the bill, as he will not be affected by them. But in the latter, whether the transfer has been made by indorsement or mere delivery, it is incumbent on the indorsee to satisfy himself that the note is a good one: and if he omit to do so, he takes it on the credit of the indorser, and must stand in the situation of the person who was holder at the time of its becoming due.

In general, an indorsement cannot be made after payment, so as to affect any of the parties except the person making such indorse-

ment. But a person not originally a party to the bill, by paying it for the honour of the parties to it, acquires a right of action against all those parties.

By the 44 Geo. III. c. 98. § 20. certain notes not exceeding 20*l.* and payable to bearer on demand, are re-issuable after payment, at any time within three years after the date.

After payment of a part, a bill may be indorsed over for the residue.

Indorsements are of two kinds, in blank or in full. An indorsement in blank, which is the most common, is made by writing the indorser's name on the back of the bill, without any mention of the name of the person in whose favour the indorsement is made. A bill payable to a certain person or bearer, or to bearer generally, or originally payable to order, and indorsed in blank, is transferable by the indorsee, either by indorsement or mere delivery.

If A. (the payee of a bill of exchange) indorse it in blank, and deliver it to B, and B write above A's indorsement, "Pay the contents to C," without subscribing his own name, B is not liable to C as an indorser of the bill; for, in order to make a party liable as an indorser, his name must appear written with an intent to indorse.

A full or special indorsement mentions the name of the indorsee in whose favour the indorsement is made, as thus, "Pay the contents to A.B. or order," and is subscribed with the name of the indorser. By this indorsement the interest in the bill is transferable in the first instance by indorsement, though afterwards it is transferable also by delivery, provided the first indorsement was in blank. But to give the bill a subsequent negotiable quality, it is not necessary that in a full indorsement the words "or order," should be subjoined to the name of the indorsee; for if a bill be drawn payable to order, the negotiability of the bill will not be restrained by the omission of the words, "or order" in the indorsement.

A bill payable to the order of A is payable to A, if he do not order it to be paid to any other person; and where no such order appears, it will be presumed that none was made.

The negotiability of a bill originally transferable may be restrained by express restrictive words; for the payee or the indorsee having the absolute property in the bill, he may by express words restrict the currency of the bill, by indorsing it, "payable to J. S. only," or "to J. S. for his use," or any other words clearly demonstrating his intention to make a restricted and limited indorsement.

A transfer by indorsement for a good and valuable consideration, and without any knowledge of defect of title, vests in the indorsee a right of action against all the precedent parties whose names are on the bill: but unless the payee, or the drawer, when the bill was payable to his order, have first indorsed it, the holder can only sue the party from whom he obtained it.

- A transfer by delivery, without any indorsement, when made

on account of a pre-existing debt, or for goods sold at the time of the assignment imposes an obligation on the assignor, in favour of the assignee, similar to that of a transfer by indorsement; and, in default of payment by the drawee, the assignee may maintain an action against the assignor on the consideration of the transfer, unless it were expressly agreed, at the time of the transfer, that the assignee should take the instrument assigned as payment, and run the risk of its being paid, or that he has been guilty of *laches*. But, as on a transfer by delivery the assignor's name is not on the instrument, there is no privity in contract between him and any person becoming assignee to the bill after the assignment by himself, and consequently no person but an immediate assignee can maintain an action against him, and that only on the original consideration, and not on the bill itself.

In case of the loss of a bill, &c. transferable by mere delivery, any person who has, previously to its becoming due, given a *bonâ fide* consideration for it may enforce payment against the acceptor or other parties, notwithstanding he derived his interest in the bill from the person who found or stole it. And if a lost or stolen bill, transferable by mere delivery, and for which no consideration has been given, be presented to the drawee at the time of its becoming due, and he pay it before he has notice of the loss or robbery, he will not be liable to pay it over again to the real owner, who, by his neglect to give due notice of his loss, has forfeited all right of action.

But when a bill transferable only by indorsement, and not indorsed, is lost by the person entitled to indorse, no person getting possession of it by a forged indorsement will acquire any interest in it, although he gave a sufficient consideration for it, and was not aware of the forgery, but will be liable to repay the bill to the original holder when he has regained possession of it. And in such a case, if payment hath been obtained by a *bonâ fide* holder from the drawee, such payment will not be protected.

In case of the loss of a bill, to entitle the holder to recover, he should immediately give notice thereof to the acceptor and all the antecedent parties; and when the bill is transferable by mere delivery, should also give public notice of the loss; but this will not be available, unless the notice of the loss be brought home to the knowledge of the party taking the bill.

By the 9 & 10 W. III. c. 17. § 3. it is enacted, that in case any inland bill expressed to be for value received, and payable after date, shall happen to be lost or miscarried within the time before limited for payment of the same, the drawer must give another bill, of the same tenor with that first given; the person to whom it is delivered giving security, if demanded, to the drawer to indemnify him against all persons whatsoever, in case the said bill, so alleged to be lost or miscarried, shall be found again. And Marius says, that if the acceptor refuse, on sufficient security, and indemnification offered, to pay a bill which he has accepted, he will be liable to make good all loss, re-exchange, and charges, (p. 77.)

In all cases of the loss of a bill of exchange, a court of equity will, on sufficient indemnity being given, enforce payment.

Of Presentment for Payment.

In all cases when a time for payment is specified in a bill of exchange, the holder must present it to the drawee for payment at the time when due; and when no time of payment is expressed, within a reasonable period after receipt of the bill; or otherwise the drawer and indorsers will be exonerated from their liability. And it has been held, that even the bankruptcy, insolvency, or death of the acceptor, will not excuse a neglect to make presentment. In the first case, presentment should be made to the bankrupt or his assignees; and in the latter, to the personal representative of the deceased, or in case there be no personal representative, at the house of the deceased. Neither will the insufficiency of a bill in any respect constitute an excuse for the non-presentment.

But all bills of exchange drawn payable at usance, or at a certain time after date or sight, or after demand, ought not to be presented for payment at the expiration of the time mentioned in the bills, but at the expiration of what may be termed days of grace. And on bills payable to the excise, six days beyond the three days of grace are allowed, if required by the acceptor. But in the case of bills payable on demand, or when no time of payment is expressed, no days of grace are allowed; but they are payable instantly on presentment. On bank post bills, also, no days of grace are claimed.

Whether days of grace are allowable on bills of exchange payable at sight, is not clearly decided; it is observable, however, that the weight of authority is in favour of such an allowance.

In case of foreign bills of exchange, the custom is, that three days, exclusive of the day on which the bill becomes due, are allowed for payment of them; and if they be not paid on the last of the said days, the holder ought immediately to protest the bill, and return it, or otherwise the drawer will be discharged. But if it happen that the last of the three days is a Sunday, Christmas-day, or Good Friday, the holder ought to demand payment on the second day, and, if it be not then paid, treat the bill as dishonoured. A presentment before the day would be a mere nullity.

With respect to inland bills payable after date or sight, or on a particular event, it does not appear to be settled whether the acceptor has not the whole day for payment, without reference to banking hours. At all events, if the holder make a second presentment on the last day of grace, the acceptor may insist on paying it when such presentment is made, without paying the fees of noting or protesting, notwithstanding such presentment be made after banking hours, and expressly for the purpose of noting and protesting. But a tender after the day of payment, and before action brought, of all money then due, is sufficient.

The days of grace which are allowed on a bill of exchange must always be computed according to the law of the place where it is due. The number of these days varies according to the customs of different countries.

In the dominions of Great Britain, Bergamo, and Vienna, three days are allowed: at Frankfort, out of the fair-time, four; at Leipsic, Naumberg, and Augsburg, five; at Venice, Amsterdam, Rotterdam, Middleburgh, Antwerp, Cologne, Breslaw, Nuremburg, Lisbon, and Portugal, six; at Naples, eight; at Dantzic, Koningsburg, and France, ten; at Hamburg and Stockholm, twelve; in Spain, fourteen; at Rome, fifteen, Genoa, thirty. At Leghorn, Milan, and some other places in Italy, there is no fixed time. Sundays and holidays are always included in these days of grace in Great Britain, Ireland, France, Naples, Amsterdam, Rotterdam, Antwerp, Middleburgh, Dantzic, and Koningsburg; but not at Venice, Cologne, Breslaw, and Nuremburg. At Hamburg, and in France, the day on which the bill falls due makes one of the days of grace, but no where else.

The causes by which a neglect to present for payment may be excused being the same as those which do away a neglect to present for acceptance, it would be a repetition to mention them here; we therefore refer the reader to that head.

If the political state of the country where the bill is due render a presentment for payment in due time impossible, presentment as soon as is practicable will entitle the holder to recover.

The contract of the acceptor being absolute, he is primarily liable, and cannot in general resist an action on account of the neglect to present the bill at the precise time when due; but if he undertook, by his acceptance, to pay within a certain period after demand, he may insist on the want of presentment.

If a bill be made or accepted payable at a banker's or at any particular place, or by a particular person not party to the instrument, the presentment for payment should in such case be complied with, or the drawer and indorsers will be discharged from their obligations; as will also the acceptor, if he has been really prejudiced.

A presentment for payment of a bill should in all cases be made within a reasonable time before the expiration of the day on which it becomes due; and if, by the known custom of any particular place, bills are payable only within limited hours, a presentment out of those hours would be improper, and would not entitle the notary to present it.

Payment should be made only to the holder of a bill, or some person properly authorized by him. In case of the death of the holder, payment should not be made to his personal representative, unless he has power to administer to his effects. But payment of a bill to a person having obtained probate of a forged will, will be valid. So payment to a minor will be valid, if the bill be benefited to him. But payment to a married woman, after knowledge of that fact, will not be valid.

Payment of a bill to a person, or his order, without knowledge of his having committed an act of bankruptcy, is effectual, and discharges the person making it, 1 Jac. I. c. 15. § 14. provided such payment be made more than two calendar months before the issuing of the commission, 46 Geo. III. c. 125. § 112. And payment of an acceptance made without notice of a secret act of bankruptcy, is, provided the bill is honoured when due, valid, although between the time of acceptance and of payment notice of the bankruptcy came to the creditor's knowledge.

So payment of a bill by a bankrupt to a *bonâ fide* creditor, without notice of the bankruptcy, is protected by the 19 Geo. II. c. 32. provided such payment be made more than two calendar months before the issuing of the commission, 46 Geo. III. c. 125. § 112. And if, when the bill becomes due, the acceptor be a bankrupt, the holder will be entitled to claim under the commission, without discharging the other parties whose names appear upon the bill from their respective liabilities, provided he has given them regular notice of nonpayment. If a promissory note of twenty years date be unaccounted for, it affords a presumption of payment, unless the contrary appear.

When a creditor directs his debtor to remit him by post the money due to him by a bill of exchange, &c. or where it is the usual way of paying a debt, if the bill be lost, the debtor will be discharged; but where the defendant, in discharge of a debt which he owed to the plaintiff, delivered a letter containing the bills, which were lost, to a bellman in the streets, it was decided that he was not discharged from liability to pay the debt, because it was incumbent on him to have delivered the letter at the General Post Office, or at least at a receiving house appointed by that office.

If, when a bill becomes due, the holder give time to the drawer, or release him when he has taken him into custody, or take a fresh security from him, without the concurrence of the other parties to the bill, they will thereby be discharged in general from all liability, although the holder may have given due notice of the non-acceptance. Similar indulgence to a drawer or a prior indorser would also discharge all subsequent parties. But in the instances before stated, where the *laches* of the holder, in not giving notice of the non-acceptance of the bill, will be excused by the circumstance of the drawer, indorser, &c. not having effects in the hands of the drawee, such parties would also not be discharged by the holder's giving time to, or taking a fresh security from the acceptor.

The holder of a bill of exchange may receive part payment from the acceptor or indorser, and sue the other parties for the residue, provided he do not give time to such acceptor or indorser to pay the residue.

If the holder of a bill of exchange compound with the acceptor or any other party to the bill, without the assent of the drawer or other subsequent parties, he thereby releases them from their responsibilities, if they had effects in the hands of the acceptor or prior indorser.

The holder may sue a prior indorser, although he have taken in execution a subsequent indorser, and afterwards let him go at large on a letter of licence without having paid the debt.

In all cases of the payment of a bill or note, a receipt should be written upon the back of the bill (43 Geo. III. c. 120. § 5.); and as a general receipt on the back of the bill of exchange is *prima facie* evidence of its having been paid by the acceptor, when payment is made by the drawer or indorser, the holder should state in the receipt by whom it is paid. Where a part is paid, the same should be acknowledged upon the bill, or the party paying may be liable to pay the amount again to a *bona fide* indorsee.

If, on presentment of a bill, the drawee refuse to pay the amount, or make default of payment, in case the bill is foreign, it is incumbent on the holder to protest it, and, whether foreign or inland, to give due notice of the dishonour to those parties to whom he means to resort for payment, or they will be discharged from their respective obligations.

In regard to the precise time within which the notice of non-payment must be given, there is no settled rule. The general rule, as it may be collected from *Tindal v. Brown*, seems to be, with respect to persons living in the same town, that the notice shall be given by the next day; and with regard to such as live at different places, that it should be sent by the next post. But if, in any particular place, the post should go out so early after the receipt of the intelligence as that it would be inconvenient to require a strict adherence to the general rule, then, with respect to a case so circumstanced, it would not be reasonable to require the notice to be sent till the second post.

In *Haynes v. Birks*, where the bill, which was put by the plaintiff in the hands of his banker to present for payment, having been dishonoured in London about two o'clock on Saturday, and presented again at nine in the evening by a notary, and notice given of the dishonour to the plaintiff on Monday at Knightsbridge, who gave notice to the indorser of it by letter on Monday at noon, which letter the indorser received on Tuesday at noon in Tottenham-Court Road; it was held, that this notice was sufficient to entitle the holder to recover against the indorser.

So where the indorsee of a bill of exchange placed it in the hands of his bankers, who returned it the day after its being dishonoured to the indorsee; it was held, that notice given to the drawer (the defendant) by the indorsee (the plaintiff) on the day after the receipt of the dishonour, was sufficient; for a banker is not obliged to give notice of the dishonour to any one but his customer.

Where there are several indorsements, and the holder gives notice of dishonour to his indorser, each successive indorser will be considered as having used due diligence, if he transmit the notice of dishonour on the day after it is received; but if he

neglect giving the notice on that day and the day after, it will be too late.

The notice of dishonour must proceed from the person who can give the drawer or indorser his immediate remedy on the bill.

And, therefore, in an action against the defendant as indorser of a bill, to prove notice of nonpayment, A was called, who swore that he had been employed by the original parties to the bill to get it discounted; and when it became due, it was in the hands of one Abbott, to whom the plaintiff had indorsed it; that the day after the witness met the defendant, and told him that it had not been paid; that the defendant asked who held it; and that the witness answered, "It lays at Messrs. Bonds, Abbott's bankers:" Lord Ellenborough said, "If you could make A the agent of the holder of the bill, the notice would be sufficient; but in reality he was a mere stranger. The bill, when dishonoured, lay at the bankers of Abbott, with whom A had no sort of connexion. But the notice must come from the person who can give the drawer or indorser his immediate remedy upon the bill; otherwise it is merely an historical fact. In this case A was not possessed of the bill, and had no controul over it. The defendant, therefore, is not proved to have had any legal notice of the dishonour of the bill, and is discharged from the liability by indorsing it."

In addition to notice of dishonour, it is necessary for the holder, in the case of a foreign bill, to protest it for nonpayment; which protest, or at least a minute of it should be made on the last day of grace. But when the bill has been already protested for non-acceptance, and due notice thereof has been given, though usual, it is not necessary to protest for nonpayment, or to give notice thereof.

Payment of a bill, whether foreign or inland, being refused, any third person, not party to the bill, may pay for the honour of the drawer, or any of the indorsers, and acquires thereby all the same rights that the holder of the bill had, although no regular transfer of the bill was made to him. This payment, as it is always made after protest, and in prudence should not be made before, is called payment *supra protest*. But the acceptor, if he has previously made a simple acceptance, cannot pay in honour of an indorser, unless he has made such acceptance without having effects of the drawer in his hands; because, as acceptor, he is already bound in that capacity. If the acceptor *supra protest*, for the honour of the drawer or indorser, receive his approbation of the acceptance, he may pay the bill without any protest for nonpayment.

PROMISSORY NOTES.

A promissory note is a direct engagement, in writing, to pay a sum specified, at a time therein limited, or on demand, to a person therein named, or his order, or to the bearer.

The validity of these instruments having been much questioned by Lord Holt, in *Clerk v. Martin*, that the payee, and in *Buller v.*

Crips, that the indorsee of a promissory note could not maintain an action against the maker thereof, such note not being within the custom of merchants, but that it was to be considered only as evidence of a debt; it was, for the purpose of encouraging trade and commerce, enacted by the 3 & 4 Ann. c. 9. § 1. "That all notes in writing, made and signed by any person or persons, body politic or corporate, or by the servant or agent of any corporation, banker, goldsmith, merchant, or trader, usually entrusted by them to sign such notes for them, whereby such persons, &c. or their servant or agent, promise to pay to any other person or persons, body politic and corporate, or order, or bearer, the money mentioned in such note, shall be construed to be, by virtue thereof, due and payable to such person, &c. to whom the same is made payable; and also such note, payable to any person, &c. or order, shall be assignable or indorsable over in the same manner as inland bills of exchange are, or may be, by the custom of merchants: and the person, &c. to whom the money is payable may maintain an action for the same, in such manner as he might upon any inland bill of exchange, made according to the custom of merchants: and the person, &c. to whom such note is indorsed or assigned may maintain an action, either against the person, &c. who, or whose servant or agent, signed such note, or against any of the persons who indorsed the same, as in cases of inland bills of exchange, and the plaintiff shall recover damages and costs of suit; and in case of nonsuit or verdict against the plaintiff, the defendant shall recover costs."

This statute places promissory notes on the same footing as bills of exchange, and consequently the decisions and rules relating to the one are in general applicable to the other.

No formal set of words is essential to the validity of this kind of instrument. Neither is it necessary that it should contain any words rendering it negotiable. A note merely promising to account with another, or his order, for a certain sum, value received, is a valid promissory note, though it contain no formal promise to pay. To render such a note valid, however, it must be made payable at all events, and not out of a particular fund; and it must be for the payment of money only, and not for the performance of any other act. A written promise to pay 300*l.* to B. or order, "in three good East-India bonds," was held not to be a promissory note: and an undertaking to pay money, and deliver up horses and a wharf on a particular day, or an engagement to pay money on demand, or surrender the body of A. B. will not operate as a note within the statute of Anne.

A note beginning, "I promise to pay," and assigned by two or more persons, is several as well as joint, and the parties may be sued jointly as well as severally; but when a promissory note is made by several, and expresses "We promise to pay," it is a joint note only.

BANK NOTES.

These notes are payable on demand, and by general consent

are treated as money in the ordinary course and transactions of business. These notes were not, until the 52 Geo. III. extended by the 36 Geo. III. c. 34. a legal tender; but by those statutes it is enacted that they shall be a good and legal tender until two years after the resumption of payment in specie by the Bank of England.* They cannot be recovered, if lost by the legal owners, from a *bonâ fide* holder for a valuable consideration, and without notice of the true owners. For the holder of a bank note is *primâ facie* entitled to prompt payment of it, and cannot be affected by the previous fraud of any former holder in obtaining it, unless evidence be given to bring it home to his privy. And as possession is *primâ facie* evidence of property in negotiable instruments, in trover for the recovery of a lost note, the defendant will not be called upon to shew his title to the note, without evidence from the other side that he got possession of it *malâ fide*, or without consideration.

BANKERS' NOTES AND CHECKS.

Bankers' cash-notes, or goldsmiths' notes, as they were formerly called, are promissory notes payable to order or bearer on demand, and are transferable by delivery. They may, however, be negotiated by indorsement, in which case the act of indorsing will operate as the making a bill of exchange. On account of their being payable on demand they are considered as cash, whether payable to order or bearer; but if presented in due time, and dishonoured, they will not amount to payment. At present cash notes are seldom made, except by country bankers, their use having been superseded by the introduction of checks.

A check, or draft, is as negotiable as a bill of exchange. In case of default of payment by the drawee, the assignee may maintain an action against the assignor, on the consideration of transfer; unless it were expressly agreed at the time of the transfer, that the assignee should take the instrument assigned as payment, and run the risk of its being paid, or that he has not used due diligence: in which cases it will amount to payment; and, in the event of the failure of the banker, the assignor, and every other party to the check, will be discharged.

As to the precise time when a check should be presented for payment, there is some degree of uncertainty. It may, however, be collected from the cases, that a check on a banker, or a cash-note, &c. payable on demand, ought, if given in the place where it is payable, to be presented for payment the same day it is received, or at farthest early the next morning, unless prevented by distance, or some inevitable cause or accident, which in all cases will excuse the neglect to make a presentment so soon as would be otherwise necessary. But, in point of law, there is no other settled rule, than that the presentment must be made

* By a subsequent statute for the resumption of cash payments by the Bank of England, the Bank note ceased to be a legal tender after the 1st May, 1823.

within a reasonable time, which, as observed by Lord Ellenborough, must be accommodated to other business and affairs of life; and the party is not bound to neglect every other transaction, in order to present the check on the same day he receives it.

When the check, &c. is due on demand, and not payable at the place where received, it is said, that it should be forwarded for payment by the next post after it is received.

Payment of a check or draft before it is due, is contrary to the usual course of business; and therefore when a banker paid a check the day before it bore date, which had been lost by the payee, he was liable to repay the amount to the loser.

When payment is made by the drawee giving a draft on a banker, it is not advisable to give up the bill until the draft is paid. If the holder of a draft on a banker receive payment thereof in the banker's notes instead of cash, and the banker fail, the drawer of the check will be discharged.

CHAPTER XVI.

Of Bankruptcy.

A **BANKRUPT** is defined to be "a trader who secretes himself, or does certain other acts, tending to defraud his creditors." The law of bankruptcy is considered as calculated for the benefit of trade, and founded on the principles of humanity as well as justice; and to that end it confers some privileges, not only on the creditors, but also on the bankrupt or debtor himself: on the creditors, by compelling the bankrupt to give up all his effects to their use, without any fraudulent concealment; on the debtor, by exempting him from the rigour of the common law, now tempered by the humane interposition of the statute law, whereby his person might be confined at the discretion of his creditor, though, in reality, he has nothing to satisfy the debt.

The laws and statutes relative to bankruptcy were, previous to the 5 Geo. IV. c. 98. extremely numerous and complicated: this act, however, is of a very sweeping nature, for it absolutely repeals, from the 1st of May, 1825, all former enactments respecting bankrupts. Its preamble recites, that whereas it is expedient to amend the laws relating to bankrupts, and to simplify the language thereof, and to consolidate the same so amended and simplified in one act, and to make other provisions respecting bankrupts; it therefore enacts, That the following statutes (including the whole of the acts upon the subject, from the first enactment, the 34 & 35 Hen. VIII. c. 4. down to the 3 Geo. IV. c. 81.) be repealed; viz. the 34 & 35 Hen. VIII. c. 4. intituled, "*An act against such persons as do make bankrupt*;" the 13 Eliz. c. 7. intituled, "*An act*

touching orders for bankrupts;" the 1 Jac. I. c. 15. intituled, "*An act for the better relief of the creditors against such as shall become bankrupts;*" the 21 Jac. I. c. 19. intituled, "*An act for the further description of a bankrupt, and relief of creditors against such as shall become bankrupts, and for inflicting corporal punishment upon the bankrupts in some special cases;*" the 13 & 14 Car. II. c. 24. intituled, "*An act declaratory concerning bankrupts;*" the 10 Ann. c. 15. intituled, "*An act for repealing a clause in the above-mentioned statute of the 1 Jac. I. c. 15. and for the explanation of the laws relating to bankruptcy in cases of partnership;*" the 7 Geo. I. c. 31. intituled, "*An act for explaining and making more effectual the several acts concerning bankrupts;*" the 5 Geo. II. c. 30. intituled, "*An act to prevent the committing of frauds by bankrupts;*" the 19 Geo. II. c. 32. intituled, "*An act for amending the laws relating to bankrupts;*" so much of the 24 Geo. II. c. 57. the title of which begins with the words "*An act to continue several laws therein mentioned, for preventing theft and rapine,*" and concludes with the words "*and to make some further provisions in relation to the signing of certificates for the discharge of bankrupts,*" as relates to the prevention of frauds by bankrupts, and to some further provisions in relation to the signing of certificates for the discharge of bankrupts;" the 4 Geo. III. c. 33. intituled, "*An act for the preventing inconveniences arising in cases of merchants, and such other persons as are within the description of the statutes relating to bankrupts being entitled to privilege of parliament, and becoming insolvent;*" so much of the 36 Geo. III. c. 90. intituled, "*An act for the relief of persons equitably and beneficially entitled to or interested in the several stocks and annuities transferable at the Bank of England,*" as relates to trustees in whose names stock shall be standing at the Bank, becoming bankrupt, and to bankrupts refusing to transfer stock standing in their own right; the 37 Geo. III. c. 124. intituled, "*An act to make perpetual an act passed in the fifth year of the reign of his late majesty, intituled, 'An act to prevent the committing of frauds by bankrupts;'*" so much of the 45 Geo. III. c. 124. intituled, "*An act to amend an act passed in the fourth year of his present majesty, intituled, 'An act for preventing inconveniences arising in cases of merchants, and such other persons as are within the description of the statutes relating to bankrupts being entitled to privilege of parliament, and becoming insolvent;'*" and to prevent delay in the entering appearances in actions brought against persons having privilege of parliament," as relates to the execution of certain bonds by traders having privilege of parliament, and to the disobedience by such traders of orders for payment of money;" the 48 Geo. III. c. 135. intituled, "*An act to amend the laws relating to bankrupts;*" the 49 Geo. III. c. 121. intituled, "*An act to alter and amend the laws relating to bankrupts;*" the 56 Geo. III. c. 137. intituled, "*An act to extend the provisions of an act of the first year of the reign of king James the First, intituled, 'An act for the better relief of the creditors against,*

such as shall become bankrupts ;” so much of the 1 Geo. IV. c. 115. intituled, “*An act to repeal so much of the several acts passed in the thirty-ninth year of the reign of Elizabeth, the fourth of George the First, the fifth and eighth of George the Second, as inflict capital punishment on certain offences therein specified, and to provide more suitable and effectual punishment for such offences,*” as relates to the punishment of frauds committed by bankrupts ; the 3 Geo. IV. c. 74. intituled, “*An act to amend the laws relating to bankrupts under joint commissions ;*” and lastly, the 3 Geo. IV. c. 81. intituled, “*An act to amend the laws relating to bankrupts.*”

What Persons are liable to be made Bankrupts.

By this act, the 5 Geo. IV. c. 98. it is enacted, That all bankers, brokers, underwriters, and persons insuring ships or their freight or other matters against perils of the sea, warehousemen, wharfingers, packers, builders, carpenters, shipwrights, victuallers, innkeepers, stage-coach proprietors, brewers, maltsters, dyers, printers, bleachers, fullers, scavengers, manufacturers of alum or kelp, cattle or sheep salesmen ; and all persons engaged in any traffic of drawing and redrawing, negotiating or discounting bills of exchange, promissory notes, or negotiable securities, except exchequer, navy, or victualling bills, or ordnance debentures ; and all persons making bricks or burning lime for sale, being tenants, lessees, or partners in such trade or undertaking ; and all persons using the trade of merchandize by way of bargaining, exchange, bartering, commission, consignment, or otherwise, in gross or by retail ; and all persons who, either for themselves, or as agents or factors for others, seek their living by buying and selling, or by buying and letting for hire, or by the workmanship of goods or commodities, shall be deemed traders liable to become bankrupt : provided, that no farmer, grazier, common labourer, or workman for hire, receiver-general of the taxes, or member of or subscriber to any incorporated, commercial, or trading companies established by charter, or by or under the authority of any act of parliament, shall be deemed, as such, a trader liable by virtue of this act to become bankrupt. § 2.

What constitutes an Act of Bankruptcy.

If any such trader shall depart this realm, or being out of the realm shall remain abroad, or depart from his dwelling-house, or otherwise absent himself, or begin to keep his house, or suffer himself to be arrested for any debt not due, or yield himself to prison, or suffer himself to be outlawed, or procure himself to be arrested, or his goods, money, or chattels to be attached, sequestered, or taken in execution, or make or cause to be made, either within the United Realm or elsewhere, any grant or conveyance of any of his lands, tenements, goods, or chattels, or make or cause to be made any surrender of any of his copyhold lands or tenements, or make or cause to be made any gift, delivery, or transfer of any of his goods or chattels, every such trader doing, suffering, procur-

ing, executing, permitting, making, or causing to be made any of the acts, deeds, or matters aforesaid, with intent to defeat or delay his creditors in the recovery of their debts, shall be deemed to have thereby committed an act of bankruptcy. § 3.

And if any such trader shall, at any meeting of his creditors, declare or admit that he is insolvent, or unable to meet his engagements; or if any such trader, having been arrested or committed to prison for debt, or on any attachment for nonpayment of money, shall, upon such or any other arrest or commitment for debt or non-payment of money, or upon any detention for debt, lie in prison for twenty-one days; or if any such trader, having been so arrested, committed, or detained, shall escape out of prison or custody, every such trader shall be deemed to have thereby committed an act of bankruptcy: provided, that if any such trader shall be in prison at the time of the commencement of this act (1st May, 1826), such trader shall not be deemed to have committed an act of bankruptcy by lying in prison, until he shall have lain in prison for the period of two months. § 4.

And if any such trader shall petition to take the benefit of the present or any future act for the relief of insolvent debtors, such petition, when filed, shall be an act of bankruptcy; but no commission shall issue thereupon, unless it be sued out within two calendar months next after notice of such petition has been inserted in the London Gazette. § 5.

And if any such trader shall file, in the office of the lord chancellor's secretary of bankrupts, a declaration in writing, signed by such trader, and attested by an attorney or solicitor, that he is insolvent, or unable to meet his engagements, the said secretary or his deputy shall sign a memorandum that such declaration had been filed, which shall be authority for the printer of the London Gazette to insert an advertisement of such declaration therein; and every such declaration shall, after such advertisement, be an act of bankruptcy committed by such trader at the time when such declaration was filed: but no commission shall issue thereupon, unless it be sued out within two calendar months next after the insertion of such advertisement, and unless such advertisement shall have been inserted in the London Gazette within eight days after such declaration was filed: and no docket shall be struck upon such act of bankruptcy before the expiration of four days next after the insertion of such advertisement, in case such commission is to be executed in London; or before eight days after such insertion, in case such commission is to be executed in the country: and in all proceedings before the commissioners, the Gazette containing such advertisement shall be evidence to be received of such declaration having been filed. § 6.

And no commission, under which the adjudication shall be grounded on the act of bankruptcy being the filing of such declaration, shall be deemed invalid by reason of such declaration having been concerted or agreed upon between the bankrupt and any creditor or other person. § 7.

And if any such trader, liable by virtue of this act to become bankrupt, shall, after a docket struck against him, pay to the person or persons who struck the same, or any of them, money, or give or deliver to any such person any satisfaction or security for his debt, or any part thereof, whereby such person may receive more in the pound in respect of his debt than the other creditors, such payment, gift, delivery, satisfaction, or security, shall be an act of bankruptcy; and if any commission shall have issued upon the docket so struck as aforesaid, the lord chancellor may either declare such commission to be valid, and direct the same to be proceeded in, or may order it to be superseded, and a new commission may issue upon such last-mentioned or any other act of bankruptcy; and every person so receiving such money, gift, delivery, satisfaction, or security as aforesaid, shall forfeit his whole debt, and also repay or deliver up such money, gift, satisfaction, or security as aforesaid, or the full value thereof, to such person or persons as the commissioners acting under such original commission, or any new commission, shall appoint, for the benefit of the creditors of such bankrupt. § 8.

And if any such trader having privilege of parliament, shall commit any of the aforesaid acts of bankruptcy, a commission of bankrupt may issue against him; and the commissioners, and all other persons acting under such commission, may proceed thereon in like manner as against other bankrupts; but such person shall not be subject to be arrested or imprisoned during the time of such privilege, except in cases hereby made felony. § 9.

And if any creditor of any such trader having privilege of parliament, to such amount as is hereinafter declared requisite to support a commission, shall file an affidavit in any court of record at Westminster, that such debt is justly due to him, and that such debtor, as he verily believes, is such trader as aforesaid, and shall sue out of the same court a summons, or an original bill and summons against such trader, and serve him with a copy thereof, if such trader shall not, within one calendar month after personal service of such summons, pay, secure, or compound for such debt to the satisfaction of such creditor, or enter into a bond in such sum, and with two sufficient sureties, as any of the judges of the court shall approve of, to pay such sum as shall be recovered in such action, together with such costs as shall be given, and within one calendar month next after personal service of such summons cause an appearance to be entered to such action in the proper court in which the same shall have been brought, every such trader shall be deemed to have committed an act of bankruptcy from the time of the service of such summons; and any such creditor or creditors of such trader may sue out a commission against him, and proceed thereon in like manner as against other bankrupts. § 10.

And if any decree or order shall have been pronounced in any cause depending in any court of equity, or any order made in any matter of bankruptcy or lunacy against any such trader having

privilege of parliament, ordering to pay any sum of money, and such trader shall disobey the same, the person entitled to receive such sum, or interested in enforcing the payment thereof, may apply to the court to fix a peremptory day for the payment, which shall accordingly be fixed by an order for that purpose; and if such trader, being personally served with it eight days before the day therein appointed, shall neglect to pay the same, he shall be deemed to have committed an act of bankruptcy from the time of the service thereof. § 11.

Of the Commission, and Proceedings under it.

The lord chancellor may, upon petition made to him in writing, against any trader having committed any act of bankruptcy, by any creditor or creditors, by commission under the great seal, appoint such persons as to him shall seem fit, who shall have the powers and authorities hereinafter mentioned; and such petitioning creditor or creditors shall, before any commission be granted, make an affidavit in writing before a master in chancery (which shall be filed with the proper officer) of the truth of his or their respective debt; and shall likewise give bond to the lord chancellor, in the penalty of 200*l.* to be conditioned for proving his or their debt, as well before the commissioners as upon any trial at law, and also for proving the party to have committed an act of bankruptcy, and to proceed on such commission; but if such debt or debts shall not be really due, or if after such commission it be not proved that the party had committed an act of bankruptcy at the time of the issuing of the commission, and it shall also appear that such commission was taken out fraudulently or maliciously, the lord chancellor may order satisfaction to be made to him or them, and for the better recovery thereof may assign such bond or bonds to the party or parties who may sue for the same in his and their name or names. § 12.

And that the petitioning creditor or creditors shall, at his or their own costs, sue forth and prosecute the commission until the choice of assignees; and the commissioners shall, at the meeting for such choice, ascertain such costs, and by writing under their hands direct the assignees to reimburse such petitioning creditor or creditors such costs out of the first money that shall be got in under the commission. And all bills of fees or disbursements of any solicitor or attorney employed under any commission shall be settled by the commissioners; provided such bills do not contain any charge respecting any action at law or suit in equity, in which case the same shall be settled by the proper officer of the court in which the business contained in such bill, or the greatest part in amount or value thereof, shall have been transacted; and the same so settled shall be paid by the assignees to such solicitor or attorney: provided, that any creditor who shall have proved to the amount of 20*l.* or upwards, if he be dissatisfied with such settlement, may have the same settled by a master in chancery, who shall receive for such settlement, and the certificate thereof, 20*s.* § 13.

And no commission shall be issued, unless the single debt of such creditor, or of two or more persons being partners, petitioning for the same, shall amount to 100*l.* or upwards; or unless the debt of two creditors shall amount to 150*l.* or upwards; or unless the debt of three or more creditors shall amount to 200*l.* or upwards; and every person who has given credit to any trader upon valuable consideration for any sum which shall not have become payable at the time such trader committed an act of bankruptcy, may so petition or join in petitioning as aforesaid, whether he shall have any security for such sum or not. § 14.

And any creditor or creditors whose debt is sufficient to entitle him or them to petition for a commission against all the partners of any firm, may petition for a commission against one or more partners; and every commission issued upon such petition shall be valid, although it does not include all the partners of the firm; and in every commission against two or more persons, the lord chancellor may supersede such commission as to one or more of such persons; and the validity of such commission shall not be thereby affected, as to any person as to whom such commission is not ordered to be superseded, nor shall any such person's certificate be thereby affected. § 15.

And if after a commission issued against two or more members of a firm, any other commission shall be issued against any other member of such firm, such other commission shall be directed to the commissioners to whom the first was directed; and immediately after the adjudication under such other commission, all the estate, real and personal, of such bankrupt shall, in case assignees have been chosen, vest in such assignees, and all separate proceedings under such other commission shall be stayed, and such commission shall, without affecting the validity of the first commission, be annexed to and form part of the same: provided, that the lord chancellor may direct that such other commission be issued to any other commissioners, or that such other commission shall proceed either separately or in conjunction with the first commission. § 16.

If, after adjudication, the debt of the petitioning creditor or creditors, or any of them, be found insufficient to support a commission, the lord chancellor may, upon the application of any other creditor or creditors, having proved any debt or debts sufficient to support a commission, order the said commission to be proceeded in. § 17.

No commission shall be deemed invalid by reason of any act of bankruptcy prior to the debt of the petitioning creditor or creditors, or any of them; provided there be a sufficient act of bankruptcy subsequent to such debt. § 18.

The lord chancellor may direct an auxiliary commission to issue for proof of debts under 20*l.* and for the examination of witnesses, or for either of such purposes; and every such commission heretofore issued is hereby declared valid; and the commissioners in every such commission, issued for the examination of witnesses,

duce any books, papers, deeds, and writings, and other documents, in his custody, possession, or power, which may appear to be necessary to establish such trading, or act of bankruptcy; and every such person so summoned shall incur such danger or penalty for not coming, or for refusing to be sworn and examined, or for not disclosing the truth, or for refusing to sign or subscribe his examination, or for refusing to produce, or for not producing any such book, paper, deed, writing, or document, as is hereby provided as to persons summoned after the adjudication of bankruptcy; and the commissioners, upon proof made before them of the petitioning creditor's debt or debts, and of the trading, and act of bankruptcy, shall thereupon adjudge such person or persons bankrupt. § 24.

The commissioners, after they have so adjudged, shall forthwith cause notice to be given in the London Gazette, and shall appoint three public meetings for the bankrupt to surrender and conform; the last of which meetings shall be on the forty-second day hereby limited for such surrender. § 25.

No commission shall abate by reason of a demise of the crown; and (if, by the death of the commissioners, or for any other cause, it become necessary) any commission may be renewed, but only half the fees usually paid upon obtaining commissions shall be paid for the same; and if any bankrupt shall die after adjudication, the commissioners may proceed in the commission as they might have done if he were living. § 26.

Any person appointed by the commissioners, by their warrant, may break open any house, chamber, shop, warehouse, door, trunk, or chest of any bankrupt, where himself or any of his property shall be reputed to be, and may seize upon the body or property of such bankrupt; and if the bankrupt be in prison or in custody, the person so appointed may seize any property (his necessary wearing apparel only excepted) in the custody or possession of such bankrupt, or of any other person, in any prison. § 27.

And the person so appointed may break open any house, chamber, shop, warehouse, door, trunk, or chest of such bankrupt, in Ireland, where any of the property shall be reputed to be, and seize the same: provided, such warrant shall have been verified upon oath, by the attorney or solicitor suing out the commission, before the mayor or other chief magistrate of the city, borough, or town corporate, where or near to which the commission is executed, and verified under the common seal thereof, or the seal of the office of such mayor or other magistrate; and provided also that the person thereby appointed shall, before a justice of peace, depose upon oath that he is the person named in such warrant. § 28.

In all cases where it shall be made to appear to the satisfaction of any justice of peace in England or Ireland, that there is reason to suspect and believe that property of the bankrupt is concealed in any house, premises, or other place not belonging to such bank-

rupt; such justice of peace is authorized to grant a search warrant to the person so deputed, who may execute the same in like manner, and shall be entitled to the same protection as is allowed by law in execution of a search warrant for property reputed to be stolen and concealed. § 29.

And if, in the execution of such warrant, it shall be necessary to have access to any house, chamber, shop, warehouse, door, trunk, or chest of such bankrupt, in Scotland, where any of the property shall be reputed to be, or to seize and get possession of such property, such warrant, after having been verified upon oath, may be backed or indorsed with the name of a judge ordinary or justice of the peace in Scotland; and such warrant so indorsed shall be sufficient authority to the person, and to all officers of the law in Scotland, to execute the same within the county or burgh wherein it is so indorsed, and in virtue thereof to break open the house, chamber, shop, warehouse, door, trunk, or chest of such bankrupt, and to seize and take possession thereof, to be distributed under the said commission, or otherwise dealt with according to law. § 30.

No action shall be brought against any person so appointed by the commissioners for any thing done in obedience to their warrant, unless demand of the perusal and copy of such warrant hath been made or left at the usual place of abode of such person, by the party intending to bring such action, or by his attorney or agent, in writing, signed and demanding the same, and unless the same hath been refused or neglected for six days after such demand; and if, after such demand and compliance therewith, any action be brought against the person so appointed, without making the petitioning creditor or creditors defendant or defendants, if living, on producing and proving such warrant at the trial, the jury shall give their verdict for the defendant, notwithstanding any defect of jurisdiction in the commissioners; and if such action be brought against the petitioning creditor or creditors, and the person so appointed as aforesaid, the jury shall, on proof of such warrant, give their verdict for the person so appointed, notwithstanding any such defect of jurisdiction; and if the verdict shall be given against the petitioning creditor or creditors, the plaintiff shall recover costs against him or them, to be taxed so as to include such costs as the plaintiff is liable to pay to the person so appointed as aforesaid. § 31.

In any action so brought against the petitioning creditor or creditors, either alone or jointly with the person so appointed, for any thing done in obedience to their warrant, proof by the plaintiff in such action that the defendant or defendants, or any of them, are petitioning creditors, shall be sufficient for the purpose of making them liable, in the same manner and to the same extent as if the act complained of in such action had been done or committed by them. § 32.

After adjudication, the commissioners may summon before them any person known or suspected to have any of the estate of the

bankrupt in his possession, or who is supposed to be indebted to him; and also any person whom they believe capable of giving information concerning any part of the bankrupt's estate, or any fictitious debt, or any spurious book or document, or other transactions material to the full disclosure of the dealings of the bankrupt; and may also require such person to produce any books, papers, deeds, and writings, and other documents in his custody or power, which may appear necessary to the verification of the deposition of such person, or to the full disclosure of any of the matters which they are authorized to inquire into; and if such person so summoned shall not come at the time appointed, having no lawful impediment, the commissioners may, by warrant under their hands and seals, apprehend and arrest such person, and have him brought before them to be examined as aforesaid. § 33.

And upon the appearance of any person so summoned, or if any person be present at any meeting of the commissioners, it shall be lawful to examine every such person either by word of mouth or by interrogatories in writing, and to reduce into writing the answers, and the party examined is required to sign and subscribe to them; and if any person shall refuse to be sworn, or being a Quaker, to make solemn affirmation, or shall refuse to answer any lawful questions put by the said commissioners, or shall not fully answer to their satisfaction, or shall refuse to sign and subscribe to the examination (not having any objection allowed by the commissioners), or shall not produce any books, papers, deeds, and writings, and other documents, in his custody or power, which such person was required to produce, and to the production of which the party shall not state any objection allowed by the commissioners, it shall be lawful for them, by warrant under their hands and seals, to commit such person to such prison as they shall think fit, there to remain without bail until he shall submit to be sworn or make affirmation as aforesaid, and full answers make to all such lawful questions, and sign and subscribe such examination, and produce such books, papers, deeds, writings, and other documents as aforesaid. § 34.

Where any witness is summoned to attend before the commissioners at any meeting prior to the adjudication, the necessary expences shall be tendered to every such witness, in like manner as is now by law required upon service of a subpoena to a witness in any action at law; and where any witness is summoned to attend at any other meeting, every such witness shall have such costs and charges as the commissioners shall think fit. § 35.

The commissioners may, by writing under their hands, summon any bankrupt before them, whether such bankrupt shall have obtained his certificate or not; and in case he shall not come at the time by them appointed, having no lawful impediment, the commissioners may, by warrant under their hands and seals, authorize any person or persons they shall think fit to arrest him, and bring him before them; and upon the appearance of such bankrupt, it shall be lawful for them to examine him upon oath,

touching all matters relating either to his trade, dealings, or estate; and to reduce his answers into writing, which he shall sign and subscribe; and if he shall refuse to be sworn, or to answer any questions put to him touching any of the matters aforesaid, or to sign and subscribe his examination, (not having an objection allowed by the commissioners), they may, by warrant under their hands and seals, commit him to prison, there to remain without bail until he shall submit himself to be sworn, and full answer make to such questions as shall be put to him, and sign his examination. § 36.

The commissioners may summon before them the wife of any bankrupt, and examine her as to his estate and effects; and she shall incur such danger or penalty for not coming, or for refusing to be sworn and examined, or to sign or subscribe her examination, or for not disclosing the truth, as is provided against other persons. § 37.

And if any gaoler, to whose custody any bankrupt or other person shall be committed, shall suffer such bankrupt or other person to escape, he shall forfeit 500*l.*; and every such gaoler shall, upon the request of any creditor who shall have proved under the commission, and who shall produce a certificate thereof under the hands of the commissioners (which they shall give *gratis*), forthwith produce any person so committed, under the penalty of 100*l.* § 38.

If any person be committed by the commissioners for refusing to answer, or not fully answering any question put to him, they shall, in their warrant of commitment, specify every such question: provided, that if any person committed shall bring any *habeas corpus* in order to be discharged, and there shall appear on the return of the writ any such insufficiency in the form of the warrant whereby such person was committed, by reason whereof he might be discharged, the court or judge before whom such party shall be brought by *habeas corpus*, shall re-commit such person to the same prison, there to remain until he shall conform, unless it shall be shewn to such court by the party, that he has fully answered all lawful questions put to him by the commissioners, or, if such person was committed for refusing to be sworn, or for not signing his examination, unless it shall appear to such court that he had a sufficient reason for the same: provided also, that such court shall, if required thereto by the party committed, inspect and consider the whole of the examination, and if it shall appear that the answer or answers of the party committed is or are satisfactory, such court may order the party to be discharged. § 39.

And in every action, in respect of any such commitment brought by any bankrupt or other person, the court before whom such action is tried shall, if thereto required by the defendant, in case the whole of the examination of the party so committed shall not have been stated in the warrant of commitment, inspect and consider the whole of such examination; and if it shall appear to such court that the party was lawfully committed, the defendant shall

have the same benefit therefrom as if the whole of such examination had been therein stated. § 40.

No writ shall be sued out against, nor copy of any process served on any commissioner, for any thing by him done, unless notice in writing shall have been delivered to him, or left at his usual place of abode, by the attorney or agent for the party intending to sue or cause the same to be sued out or served, at least one calendar month; and such notice shall set forth the cause of action; and on the back shall be indorsed the name of the attorney or agent, together with the place of his abode, who shall receive no more than twenty shillings for preparing and serving such notice. § 41.

And no such plaintiff shall recover any verdict against such commissioner in any case where the action shall be grounded on any act of the defendant as commissioner, unless it is proved upon the trial that such notice was given as aforesaid; but in default thereof such commissioner shall recover a verdict and costs as aforesaid; and no evidence shall be permitted to be given by the plaintiff of any cause of action, except such as is contained in the notice. § 42.

And every such commissioner may, at any time within one calendar month after such notice, tender amends to the party complaining, or to his agent or attorney; and if the same is not accepted, may plead such tender in bar to any action grounded on such writ or process, together with the plea of Not Guilty, and any other plea with leave of the court; and if, upon issue joined, the jury shall find the amends to have been sufficient, they shall give a verdict for the defendant; and if the plaintiff shall become nonsuit, or shall discontinue his action, or if judgment shall be given for such defendant upon demurrer, he shall be entitled to the like costs as if he had pleaded the general issue only; and if upon issue joined, the jury shall find that no amends were tendered, or that the same were not sufficient, and also against the defendant on such other plea or pleas, they shall give a verdict for the plaintiff, and such damages as they shall think proper, together with costs of suit: provided, that if any such commissioner shall neglect to tender any amends, or shall have tendered insufficient before the action, he may, by leave of the court, at any time before issue joined, pay such sum of money as he shall think fit, whereupon such proceedings shall be had, as in other actions where the defendant is allowed to pay money into court. § 43.

And every action brought against any person, for any thing done in pursuance of this act, shall be commenced within three calendar months after the fact committed; and the defendant may plead the general issue, and give this act and the special matter in evidence, and that the same was done by authority of this act; and if it shall appear so to have been done, or that such action was commenced after the time before limited for bringing the same, or brought in any other county than as aforesaid, the jury shall find for the defendant; and if there be a verdict for

the defendant, or if the plaintiff shall be nonsuited or discontinued his action, or if upon demurrer judgment shall be given against the plaintiff, the defendant shall recover double costs. § 44.

The commissioners may by writing under their hands appoint one or more person or persons as assignees of the bankrupt's real and personal estate, or of any part thereof, until the choice of assignees by the creditors; which latter shall divest such estate out of the assignee or assignees appointed by the commissioners; and every assignee so appointed by the commissioners shall deliver up all the estate of the bankrupt to the assignees so chosen as hereinafter mentioned; and if such first assignee or assignees shall not, within ten days after notice of the said choice of assignees, and of their consent to accept such assignment, signified to them by writing under their hands, make such delivery as aforesaid, every such first assignee shall forfeit 200*l*. § 45.

At the three several meetings appointed by the commissioners, and at every other meeting appointed for proof of debts, whereof ten days notice shall have been given in the London Gazette, every creditor may prove his debt by his own oath; and all bodies corporate and public companies may prove by an agent; and if any creditor shall live remote from the place of meeting, he may prove by affidavit sworn before a master in chancery, ordinary or extraordinary, or if he shall live out of England, by affidavit sworn before a magistrate where he shall be residing, and attested by a notary public; and no creditor shall pay any contribution on account of any such debt: provided, that it shall be lawful for the commissioners to examine upon oath, either by word of mouth or by interrogatories in writing, every person claiming to prove a debt, or to require such further proof, and examine such other persons in relation thereto, as they shall think fit. § 46.

Every person with whom any bankrupt shall have really and *bonâ fide* contracted any debt or demand before the issuing the commission, shall, notwithstanding any prior act of bankruptcy committed by such bankrupt, be admitted to prove the same, and be a creditor under such commission; provided, such person had not, at the time the same was contracted, notice (either actual or constructive) of any act of bankruptcy by such bankrupt committed, or that he had stopped payment. § 47.

Where there has been mutual credit given by the bankrupt and any other person, or where there are mutual debts between the bankrupt and any other person, the commissioners shall state the account between them, and one debt or demand may be set against another, notwithstanding any prior act of bankruptcy before the credit given to or the debt contracted; and what shall appear due on either side on the balance of such account, and no more, shall be claimed or paid on either side respectively; and every debt or demand hereby made proveable against the estate of the bankrupt may also be set off in manner aforesaid against such estate: provided that, where there has been such prior act

of bankruptcy, such credit was given to the bankrupt two calendar months before the date and suing forth of the commission; and that the person claiming the benefit of such set-off had not, when such credit was given, any notice either actual or constructive of an act of bankruptcy, or that the bankrupt had stopped payment. § 48.

Any person who shall have given credit to the bankrupt upon valuable consideration, for any money which shall not have become payable when he committed an act of bankruptcy, may prove such debt as if the same was payable presently, and receive dividends equally with the other creditors, deducting only thereout a rebate of interest at the rate of five per cent. to be computed from the declaration of a dividend, to the time such debt would have become payable, according to the terms upon which it was contracted. § 49.

And any person who at the issuing the commission shall be surety or liable for any debt of the bankrupt, or bail for the bankrupt, either to the sheriff or to the action, may, if he shall have paid the debt, or any part thereof in discharge of the whole debt, (although he may have paid the same after the commission issued) if the creditor shall have proved his debt under the commission, stand in the place of such creditor as to the dividends upon such proof; or if the creditor shall not have proved under the commission, may prove his demand as a debt, not disturbing the former dividends, and may receive dividends with the other creditors, although he may have become surety, bail, or liable as aforesaid, after an act of bankruptcy committed; provided that such person had not, when he became such surety or bail, or so liable as aforesaid, notice either actual or constructive of any act of bankruptcy by such bankrupt, or that he had stopped payment. § 50.

The obligee in any bottomry or respondentia bond, and the assured in any policy of insurance, shall be admitted to claim; and after the loss or contingency shall have happened, to prove his debt or demand in respect thereof, and receive dividends with the other creditors, as if the loss or contingency had happened before the issuing the commission against such obligor or insurer; and the person effecting any policy of insurance upon ships or goods with any person as a subscriber or underwriter becoming bankrupt, may prove any loss to which such bankrupt shall be liable in respect of such subscription, although the person so effecting such policy was not beneficially interested in such ships or goods, in case the person or persons so interested is not or are not within the United Realm. § 51.

And any annuity creditor of any bankrupt, by whatever assurance the same be secured, and whether there were or not any arrears of such annuity due at the bankruptcy, may prove for the value of such annuity; which value the commissioners shall ascertain, with reference to the original price given, deducting therefrom such diminution in the value thereof as shall have been caused by

the lapse of time since the grant thereof to the date of the commission. § 52.

And it shall not be lawful for any person entitled to annuity granted by any bankrupt to sue any person who may be collateral surety for the payment of such annuity, until such annuitant shall have proved under the commission for the value of such annuity, and for the arrears thereof; and if such surety, after such proof, pay the amount, he shall be thereby discharged from all claims in respect of such annuity; and if such surety shall not (before any payment of the said annuity subsequent to the bankruptcy shall have become due) pay the sum so proved, he may be sued for the accruing payments, until such annuitant shall have been paid or satisfied the amount, with interest thereon at the rate of four per cent. per ann. from the time of notice of such proof, and of the amount thereof, being given; and after such payment, such surety shall stand in the place of such annuitant in respect of such proof as aforesaid, to the amount paid or satisfied; and the certificate of the bankrupt shall be a discharge to him from all claims of such annuitant or of such surety: provided, that such surety shall be entitled to credit in account with such annuitant for any dividends received by such annuitant under the commission, before such surety shall have fully paid or satisfied the amount so proved as aforesaid. § 53.

If any bankrupt shall, before the issuing of the commission, have contracted any debt payable upon a contingency which shall not have happened before the issuing of such commission, the person with whom such debt has been contracted may, if he think fit, apply to the commissioners to set a value upon such debt, and to admit such person to prove the amount so ascertained, and to receive dividends thereon, or if such value shall not be so ascertained before the contingency shall have happened, then such person may, after such contingency shall have happened, prove in respect of such debt, and receive dividend with the other creditors, not disturbing any former dividends; provided such person had not, when such debt was contracted, notice either actual or constructive of any act of bankruptcy by such bankrupt, or that he was insolvent, or had stopped payment. § 54.

In all future commissions against any person or persons liable upon any bill of exchange or promissory note, whereupon interest is not reserved, overdue at the issuing the commission, the holder of such bill of exchange or promissory note may prove for interest upon the same, to be calculated by the commissioners to the date of the commission, at such rate as is allowed by the Court of King's Bench in actions upon such bills or notes. § 55.

And it is enacted, that if any plaintiff in any action at law, or suit in equity, or petitioner in bankruptcy or lunacy, shall have obtained any judgment, decree, or order against any person who shall thereafter become bankrupt, for any debt or demand in respect of which such plaintiff or petitioner shall prove under the commission, he may also prove for the costs which he shall have incurred in obtaining the same, although such costs shall not have

been taxed at the time of the bankruptcy, § 56.

No creditor who has brought any action or suit against any bankrupt, in respect of a demand prior to the bankruptcy, or which might have been proved as a debt under the commission against such bankrupt, shall prove a debt under such commission, or have any claim entered upon the proceedings under such commission, without relinquishing such action or suit; and the proving or claiming a debt under a commission shall be deemed an election to take the benefit of such commission with respect to the debt so proved or claimed: provided, that such creditor shall not be liable to the payment to such bankrupt or his assignees of the costs of such action or suit so relinquished by him, and that where any such creditor shall have brought any action or suit against such bankrupt jointly with any other person or persons, his relinquishing such action or suit against the bankrupt shall not affect such action or suit against such other person or persons: provided, that any creditor who shall have so elected to prove or claim as aforesaid, if the commission be afterwards superseded, may proceed in the action as if he had not so elected, and in bailable actions shall be at liberty to arrest the defendant *de novo*, if he has not put in bail below, or perfected bail above, or if the defendant has put in or perfected such bail, to have recourse against such bail by requiring the bail below to put in and perfect bail above, within the first eight days in term after notice in the London Gazette of the superseding such commission, and by suing the bail upon their recognizance, if the condition thereof is broken. § 57.

And whenever it shall appear to the assignees, or to two or more creditors who have each proved debts to the amount of 20*l.* or upwards, that any debt proved under the commission is not justly due, either in whole or in part, such assignees or creditors may make representation thereof to the commissioners, who may summon before them and examine upon oath any person who shall have so proved as aforesaid, together with any person whose evidence may appear to be material either in support of or in opposition to any such debt; and if the commissioners, upon the evidence given on both sides, or (if the person who shall have so proved as aforesaid shall not attend to be examined, having been first duly summoned, or notice having been left at his last place of abode) upon the evidence adduced, shall be of opinion that such debt is not due either wholly or in part, they may expunge the same, either wholly or in part, from the proceedings: provided, that such assignees or creditors requiring such investigation shall, before it is instituted, sign an undertaking to be filed with the proceedings, to pay such costs as the commissioners shall adjudge, to the creditor who has proved such debt; such costs to be recovered by petition: provided also, that such assignees or creditors may apply, in the first instance, by petition to the lord chancellor, or that either party may petition against the determination of the commissioners. § 58.

Of the Assignees.

And at the second meeting appointed by the commissioners, assignees of the bankrupt's estate and effects shall be chosen; and all creditors who have proved debts to the amount of ten pounds and upwards, and joint creditors of two or more persons being partners, who have proved debts to such amount in any commission against one or more of such partners, may vote in such choice; and also any person authorized by letter of attorney from any creditor or creditors, upon proof of the execution thereof, either by affidavit sworn before a master in chancery, ordinary or extraordinary, or by oath before the commissioners, and in case of creditors residing out of England, by oath before a magistrate where the party shall be residing, duly attested by a notary public. § 59.

The commissioners shall have power to reject any person so chosen, who shall appear to them for any reason unfit for the office of assignee. § 60.

And upon such choice being made, a certificate or declaration shall be signed by the commissioners, and such certificate or declaration shall immediately vest the whole of such bankrupt's real or personal estate, both within the United Kingdom and abroad, except copyhold and customary lands, and all such estate as aforesaid which he may purchase, or which may revert, descend, be devised, or come to him before he shall have obtained his certificate of conformity, and all debts due or to be due to the bankrupt, in such assignee or assignees, for the benefit of the creditors who shall have proved under the commission, as fully and with the same rights and powers, both of alienating or recovering the same, as such bankrupt possessed; provided that such certificate or declaration of the choice of assignees be entered of record, within two months from the signature thereof, in the office of the register of proceedings in bankruptcy. § 61.

The lord chancellor may, upon petition, direct the removal of any assignee, and the creditors shall thereupon proceed in manner aforesaid to the choice of a new assignee, and the certificate or declaration of such choice of a new assignee, signed by the commissioners as aforesaid, shall vest the whole of such bankrupt's real and personal estate in such new assignee, either solely or jointly with any assignee or assignees who shall not have been removed; provided that the order for the removal of such assignee, and the certificate or declaration of the choice of a new assignee or assignees as aforesaid, be both entered of record in manner aforesaid. § 62.

Whenever a new assignee or assignees shall be chosen, no action at law or suit in equity shall be thereby abated; but the court may, upon the suggestion of such removal and new choice, allow the name of such new assignee or assignees to be substituted in the place of the former; and such action or suit shall be prosecuted in the name or names of the new assignee or

assignees, in the same manner as if he or they had originally commenced the same. § 63.

Assignees may, by deed indented and enrolled in any of his majesty's courts of record, make sale for the benefit of the creditors of any copyhold or customaryhold lands, or of any interest to which any bankrupt is entitled therein, and thereby entitle or authorize any person or persons on their behalf to surrender the same, at any court at which the same may be lawfully surrendered, for the purpose of any purchaser or purchasers being admitted thereto. § 64.

Every person to whom any sale of copyhold or customary lands or tenements shall be made by the assignees, shall, before he enter, agree and compound with the lords of the manors of whom the same shall be holden, for such fines, dues, and other services as theretofore have been usually paid for the same; and thereupon the said lords shall, at the next or any subsequent court, grant unto such vendee, upon request, the said copy or customary lands or tenements, for such estate or interest as shall have been so sold to him as aforesaid, reserving the ancient rents, customs, and services, and shall admit him tenant of the same. § 65.

Assignees may, by deed indented and enrolled as aforesaid, make sale, for the benefit of the creditors, of any hereditaments situated in England or Ireland, whereof the bankrupt is seised of any estate tail in possession, reversion, or remainder; and every such deed shall be good against the bankrupt and the issue of his body, and against all persons claiming under him after he became bankrupt, and against all persons whom the said bankrupt, by fine, common recovery, or other means, might cut off or debar from any remainder, reversion, or other interest in or out of any of the said hereditaments. § 66.

And if any bankrupt shall have granted, conveyed, assured, or pledged any real or personal estate, or deposited any deeds, such grant, conveyance, assurance, pledge, or deposit being upon condition or power of redemption at a future day, by payment of money or otherwise, the assignees may, before the time for the performance of such condition, make tender or payment of money, or other performance, according to such condition, as fully as the bankrupt might have done; and after such tender, payment, or performance, may sell and dispose of such real or personal estate. § 67.

All sales, either of the real or personal estate of bankrupts, or of such debts as aforesaid, shall be free from auction duty. § 68.

If any real or personal estate or debts of any bankrupt be extended after he shall have become bankrupt, by any person under pretence of his being an accountant of or debtor to the king, the commissioners may examine upon oath whether the said debt was due upon any contract originally made between such accountant and the bankrupt; and if such contract was originally made with any other person than the said debtor or accountant, or in trust for any other person or persons, the commissioners may sell and

dispose of such real and personal estate or debts for the benefit of the creditors; and such sale shall be valid against the said extent, and all persons claiming under it. § 69.

And if any bankrupt, at the time he becomes bankrupt, shall, by the consent and permission of the true owner thereof, have in his possession, order, or disposition, any goods or chattels whereof he was reputed owner, or whereof he had taken upon him the sale, alteration, or disposition as owner, the commissioners may sell and dispose of the same for the benefit of the creditors: provided, that nothing herein contained shall invalidate or affect any transfer or assignment of any ship or vessel, or any share thereof, made as a security for any debt or debts, either by way of mortgage or assignment duly registered according to the provisions of the 4 Geo. IV. c. 41. intituled, "*An act for the registering of vessels.*" § 70.

If any bankrupt, being at the time insolvent, shall (except upon the marriage of any of his children, or for some valuable consideration) have conveyed, assigned, or transferred to any of his children, or any other person, any hereditaments, officers' fees, annuities, leases, goods, or chattels, or have delivered or made over to any such person any bills, bonds, notes, or other securities, or have transferred his debts to any other person or persons, or into any other person's name, the commissioners may sell and dispose of the same. § 71.

When any distress for rent shall be made and levied upon the goods or effects of any person becoming bankrupt, whether before or after the issuing of a commission (an act of bankruptcy having been previously committed), if there shall be two years rent or upwards due to the landlord or party making the distress, such distress shall not be in any manner available for more than two years rent accruing prior to the date of the commission; but the landlord or party to whom the rent shall be due, shall be allowed to come in as a creditor under a commission for the overplus of the rent due, and for which the distress shall not be available. § 72.

Any bankrupt entitled to any lease or agreement for a lease, if the assignees accept the same, shall not be liable to pay any rent accruing after the date of the commission, or to be sued in respect of any subsequent non-observance or non-performance of the conditions, covenants, or agreements therein contained; and if the assignees decline the same, shall not be liable as aforesaid, in case he deliver up such lease or agreement to the lessor, or such person agreeing to grant a lease, within fourteen days after he shall have notice the assignees shall have declined as aforesaid; and if the assignees shall not, upon being thereto required, elect whether they will accept or decline such lease or agreement for a lease, the lessor or person so agreeing as aforesaid, or any person entitled under such lessor or person so agreeing, may apply by petition to the lord chancellor, who may order them so to elect, and to deliver up such lease or agreement, in case they shall

decline the same, and the possession of the premises; or may make such other order therein as he shall think fit. § 73.

If any bankrupt shall have entered into any agreement for the purchase of any estate in land, the vendor thereof, or any person claiming under him, if the assignees of such bankrupt shall not (upon being thereto required) elect whether they will abide by and execute such agreement, or abandon the same, may apply by petition to the lord chancellor, who may thereupon order them so to elect, and if they shall elect to abandon the same, may order them to deliver up the said agreement and the possession of the premises to the vendor or person claiming under him, or may make such other order therein, as he shall think fit. § 74.

All powers vested in any bankrupt, which he might legally execute for his own benefit, (except the right of nomination to any vacant ecclesiastical benefice) may be executed by the assignees for the benefit of the creditors, in such manner as the bankrupt might have executed the same. § 75.

The lord chancellor may, upon the petition of the assignees or any purchaser from them of any part of the bankrupt's estate, if such bankrupt shall not try the validity of the commission, or if there shall have been a verdict at law establishing its validity, order the bankrupt to join in any conveyance of such estate or any part thereof; and if he shall not execute such conveyance within the time directed by the order, such bankrupt, and all persons claiming under him, shall be estopped from objecting to the validity of such conveyance; and all estate, right, or title which such bankrupt had therein, shall be as effectually barred, by such order, as if such conveyance had been executed by him. § 76.

If any bankrupt shall have standing in his name as trustee, either alone or jointly, any government stock, funds, or annuities, or any of the stock of any company within the United Realm, the lord chancellor may, on the petition of the person or persons entitled in possession to the receipt of the dividends thereof, on due notice given to all other persons (if any) interested therein, order the assignees, and all persons whose act or consent thereto is necessary, to transfer the said stock, funds, or annuities to such person or persons as the lord chancellor shall think fit, upon the same trusts as the said stock, funds, or annuities were subject to before the bankruptcy, or such of them as shall be then subsisting and capable of taking effect, and also to receive and pay over the dividends thereof as the lord chancellor shall direct; and if any such bankrupt shall have any such stock, funds, or annuities standing in his name as aforesaid, in his own right, the commissioners may, by writing, under their hands, order all persons whose act or consent is thereto necessary, to transfer the same into the name of the assignees, and to pay all dividends upon the same to such assignees. § 77.

All conveyances by, all payments by, and all contracts and other dealings and transactions by and with any bankrupt, *bond fide* made and entered into more than two calendar months before

the date and issuing of the commission against him; and all executions, attachments, and distresses for rent against the lands and tenements or goods and chattels of such bankrupt, *bonâ fide* executed or levied more than two calendar months before the issuing of such commission, shall be valid, notwithstanding any prior act of bankruptcy by him committed; provided the person or persons so dealing with such bankrupt, or at whose suit or on whose account such execution, attachment, or distress shall have issued or been levied, had not, at the time of such conveyance, payment, contract, dealing, or transaction, or at the time of executing or levying such execution, attachment, or distress, notice, either actual or constructive, of any prior act of bankruptcy by him committed, or that he had stopped payment: provided also, that where a commission has been superseded, if any other commission shall issue against any person or persons comprised in such first commission within two calendar months next after it shall have been superseded, no such conveyance, payment, contract, dealing, or transaction, execution, attachment, or distress shall be valid, unless made, entered into, executed, or levied more than two calendar months before the issuing of the first commission. § 78.

No person, really and *bonâ fide* a creditor of any bankrupt, shall be liable to repay to the assignees any money which before the issuing of the commission was really and *bonâ fide* received by such person of the bankrupt; provided such person had not at the time of receiving the same such notice as aforesaid. § 79.

The issuing of a commission shall be deemed notice of a prior act of bankruptcy (if an act of bankruptcy has been actually committed before the issuing the commission) if the adjudication of the person or persons against whom such commission has issued shall have been notified in the London Gazette, and the person or persons to be affected by such notice may reasonably be presumed to have seen the same. § 80.

No person or company having in his or their possession or custody any personal estate belonging to any bankrupt, nor any person indebted to such bankrupt, shall be endangered by reason of the delivery of any such personal estate, or the payment of any such debt to the bankrupt or his order; provided such person or company, had not, at the time of such delivery or payment, actual notice that such bankrupt had committed an act of bankruptcy, or had stopped payment. § 81.

And if any accredited agent of any body corporate, or public company, shall have had notice, either actual or constructive, of any act of bankruptcy or stoppage of payment, such body corporate or company shall be thereby deemed to have had such notice. § 82.

No title to any real or personal estate sold under any commission, or under any order in bankruptcy, shall be impeached by the bankrupt or any person claiming under him, in respect of any defect in the suing out of the commission, or in any of the proceedings under the same, unless the bankrupt shall have com-

menced proceedings to supersede the said commission, and duly prosecuted the same, within twelve calendar months from the issuing thereof. § 83.

The assignees, with the consent of the major part in value of creditors, who shall have proved under the commission, present at any meeting, whereof and of the purport whereof twenty-one days notice shall have been given in the London Gazette, may compound with any debtor to the bankrupt's estate, and take any reasonable part of the debt in discharge of the whole, or may give time or take security for the payment of such debt; or may submit any dispute between such assignees and any persons, concerning any matter relating to such bankrupt's estate, to the determination of arbitrators, to be chosen by the assignees and the major part in value of such creditors, and the party with whom they shall have such dispute; and the award shall be binding on all the creditors; and the assignees are hereby indemnified for what they shall do according to the directions aforesaid; and no suit in equity shall be commenced by the assignees without such consent as aforesaid: provided, that if no creditor (except the assignees) shall attend at any such meeting, whereof such notice shall have been given as aforesaid, the assignees shall have power, with the consent of the commissioners testified in writing under their hands, to do any of the matters aforesaid, and the same shall be binding on all the creditors. § 84.

In any commission against any one or more member or members of a firm, the lord chancellor may, upon petition, authorize the assignees to commence or prosecute any action at law or suit in equity, in the names of such assignees and of the remaining partner or partners, against any debtor of the partnership, and may obtain such judgment, decree, or order therein, as if such action or suit had been instituted with the consent of such partner or partners; and if such partner or partners shall execute any release of the debt or demand for which such action or suit is instituted, such release shall be void: provided, that every such partner, if no benefit is claimed by him by virtue of the said proceedings, shall be indemnified against the payment of any costs in respect of such action or suit, and that the lord chancellor may, upon the petition of such partner, direct that he may receive so much of the proceeds of such action or suit as the lord chancellor shall think fit. § 85.

In any action by or against any assignee, or in any action against any commissioner or person acting under the warrant of the commissioners, for any thing done as such commissioner, or under such warrant, no proof shall be required at the trial of the petitioning creditor's debt or debts, or of the trading, or act or acts of bankruptcy respectively, unless the other party in such action shall, if defendant, at or before pleading, and, if plaintiff, before issue joined, give notice in writing to such assignee, commissioner, or other person, that he intends to dispute some and which of such matters: and where such notice shall have been given, if such

assignee, commissioner, or other person shall prove the matter so disputed, or the other party admit the same, the judge before whom the cause shall be tried may, if he thinks fit, grant a certificate of such proof or admission; and such assignee, commissioner, or other person shall be entitled to the costs, to be taxed by the proper officer, occasioned by such notice; and such costs shall, if such assignee, commissioner, or other person shall obtain a verdict, be added to the costs, and if the other party shall obtain a verdict, shall be deducted from the costs, which such other party would otherwise be entitled to receive from such assignee, commissioner, or other person. § 86.

And in all suits in equity by or against the assignees, no proof shall be required at the trial of the petitioning creditor's debt or debts, or of the trading, or act or acts of bankruptcy respectively, as against any of the parties in such suit, except such parties as shall, within ten days after rejoinder, give notice in writing to the assignees of his or their intention to dispute some and which of such matters; and where such notice shall have been given, if the assignees shall prove the matter so disputed, the costs occasioned by such notice to be taxed by the proper officer shall, if the court see fit, be paid by the party or parties so giving such notice as aforesaid, and the service of such notice may be proved by affidavit upon hearing of the cause. § 87.

If the bankrupt shall not, if he was within the United Kingdom at the issuing of the commission, within two calendar months after the adjudication, or (if he was out of the United Kingdom) within two calendar months after his return, have given notice of his intention to dispute the commission, and have proceeded therein with due diligence, the depositions taken before the commissioners at the time of or previous to the adjudication of the petitioning creditor's debt or debts, and of the trading and act of bankruptcy, shall be conclusive evidence of the matters therein respectively contained, in all actions at law or suits in equity brought by the assignees for any debt or demand for which the bankrupt might have sustained any action or suit. § 88.

And if the assignees commence any action or suit for any money, before the time allowed as aforesaid for him to dispute the commission shall have elapsed, any defendant in any such action or suit may, after notice given to the assignees, pay the same or any part thereof into the court; and all proceedings shall thereupon be stayed, and after the time aforesaid shall have elapsed, the assignees shall have the same paid to them out of court. § 89.

All persons from whom the assignees shall have recovered any real or personal estate, either by judgment or decree, are hereby discharged, in case the commission be afterwards superseded, from all demands which may thereafter be made in respect of the same by the person or persons against whom such commission issued, and all persons claiming under him or them; and all persons who shall, without action or suit, *bonâ fide* deliver up possession of any real or personal estate to the assignees, or pay

any debt claimed by them, are hereby discharged from all claim of any such person or persons as aforesaid in respect of the same, or any person claiming under him or them; provided such notice to try the validity of the commission had not been given and been proceeded in within the time and in manner aforesaid. § 90.

And all things done pursuant to the 5 Geo. II. and hereby repealed, whereby it was enacted that the lord chancellor should appoint a place where all matters relating to commissions of bankruptcy should be entered of record, and should appoint a person to have the custody thereof, be hereby confirmed; and the lord chancellor may from time to time, by writing under his hand, appoint a proper person, who shall by himself, or his deputy, to be approved by the said lord chancellor, enter of record all matters relating to commissions, and have the custody of the entries thereof; and the person so to be appointed, and his deputy, shall continue in their respective offices so long as they shall respectively behave themselves well, and shall not be removed, except by order in writing under the hand of the lord chancellor, on sufficient cause therein specified. § 91.

In all commissions to be issued after the passing of this act, no commission of bankruptcy, adjudication of bankruptcy by the commissioners, certificate or declaration of choice of assignees, or certificate of conformity, shall be received as evidence in any court of law or equity, unless the same shall have been first so entered of record as aforesaid: and the person so appointed to enter matters of record as aforesaid shall be entitled to receive for such entry of every such commission, adjudication of bankruptcy, and certificate or declaration of choice of assignees, or order for vacating the same respectively, having the certificate of such entry indorsed thereon respectively, the fee of five shillings each; and for the entry of every certificate of conformity, having the like certificate indorsed thereon, two shillings and sixpence; and every such instrument shall be so entered of record, upon the application of or on behalf of any party interested therein, and on payment of the several fees aforesaid, without any petition in writing presented for that purpose: and the lord chancellor may, upon petition, direct any depositions, proceedings, or other matter relating to commissions of bankruptcy, to be entered of record as aforesaid, and also appoint such fee and reward for the labour therein of the person so appointed as aforesaid, as the lord chancellor shall think reasonable; and all persons shall be at liberty to search for any of the matters so entered of record as aforesaid: provided, that on the production in evidence of any instrument so directed to be entered of record, having the certificate thereon purporting to be signed by the person so appointed to enter the same, or by his deputy, the same shall, without any proof of such signature, be received as evidence of such instrument having been so entered of record as aforesaid. § 92.

And in every action, suit, or issue, office copies of any original instrument or writing filed in the office, or officially in the pos-

session of the lord chancellor's secretary of bankrupts, shall be evidence to be received of every such original instrument or writing respectively; and if any such original instrument or writing shall be produced on any trial, the costs of producing the same shall not be allowed on taxation, unless it appears that the production of such original instrument or other writing was necessary. § 93.

And any bankrupt or other person who shall, in any examination before the commissioners, or in any affidavit or deposition authorized or directed by the present or any act hereby repealed, wilfully and corruptly swear falsely, being convicted thereof, shall suffer the pains and penalties in force against wilful and corrupt perjury; and where any oath is hereby directed to be taken or administered, or affidavit to be made, by or to any party, such party, if a Quaker, shall or may make solemn affirmation; and all Quakers who shall in any case knowingly and wilfully affirm falsely, shall suffer the same penalties as are provided against persons guilty of wilful and corrupt perjury. § 94.

All sums of money forfeited under this act, or by virtue of any conviction for perjury, may be sued for by the assignees in any of his majesty's courts of record; and the money so recovered, the charges of suit being deducted, shall be divided among the creditors; and if the creditors shall have been fully paid, one moiety of the surplus shall be paid to the king, and the other to the poor of the parish where the bankrupt resided. § 95.

Assignees shall keep an account, wherein they shall enter all property of the bankrupt received by them, and all payments made on account of the bankrupt's estate; which account every creditor who shall have proved may inspect at all seasonable times; and the commissioners may at all times summon the assignees before them, and require them to produce all books, papers, deeds, writings, and other documents relating to the bankruptcy in their possession; and if they shall not come at the time appointed, having no impediment made known to the commissioners, and allowed by them, they may, by warrant under their hands and seals, cause such assignees to be arrested and brought before them, and upon their refusing to produce such books, deeds, writings, papers, or documents as aforesaid, they may commit the party so refusing to prison, there to remain without bail, until they shall submit themselves to the commissioners. § 96.

At the meeting of creditors for the choice of assignees, the major part in value may direct how and with whom and where the money received from time to time out of the estate shall be paid in and remain until it be divided; and if the creditors shall not make such direction, the commissioners shall, immediately after such choice, make such direction; but no money shall be directed to be paid into the hands of any of the commissioners, or of the solicitor to the commission, or into any banking-house or other house in which any such commissioner, assignee, or solicitor is interested.

The commissioners may, as often as it shall appear expedient for the bankrupt's estate, direct any money, part of such estate, to be invested in the purchase of exchequer bills, for the benefit of the creditors, and may direct where and with whom such exchequer bills shall be kept, and cause such exchequer bills to be sold, and may direct the proceeds to be again laid out in exchequer bills, or to be applied to the benefit of the creditors, subject to the control of the lord chancellor. § 98.

If any assignee shall retain in his hands, or employ for his own benefit, or knowingly permit any co-assignee so to retain or employ any sum to the amount of 100*l.* or upwards, part of the estate of the bankrupt, or shall neglect to invest any money in the purchase of exchequer bills when so directed as aforesaid, every such assignee shall be liable to be charged in his accounts with such sum as shall be equal to the interest at the rate of twenty per cent. on all such money for the time during which he shall have so retained or employed the same, or permitted the same to be so retained or employed as aforesaid, or during which he shall have so neglected to invest the same in the purchase of exchequer bills; and the commissioners may charge every such assignee in his accounts accordingly. § 99.

And if any assignee, indebted to the estate of which he is such assignee in respect of money so retained or employed by him as aforesaid, become bankrupt, if he shall obtain his certificate, it shall only have the effect of freeing his person from arrest and imprisonment; but his future effects (his tools of trade, necessary household goods, and the necessary wearing apparel of himself, his wife and children, excepted), shall remain liable for so much of his debts to the estate of which he was assignee, as shall not be paid by dividends under his commission, together with lawful interest for the whole debt. § 100.

The commissioners shall, at the meeting appointed for the last examination of the bankrupt, appoint a public meeting, not sooner than four nor later than six calendar months therefrom, (whereof, and of the purport whereof, they shall give twenty-one days notice in the London Gazette) to audit the accounts of the assignees; and the assignees at such meeting shall deliver upon oath a true statement in writing of all moneys received by them respectively, and when and on what account, and how the same have been employed; and the commissioners shall examine such statement, and compare the receipts with the payments, and ascertain what balances have been from time to time in the hands of such assignees respectively, and shall inquire whether any sum appearing to be in their hands ought to be retained; and the said assignees may be examined upon oath by the said commissioners touching the truth of such accounts: and in such accounts the said assignees shall be allowed to retain all such money as they shall have expended in suing out and prosecuting such commission, and all other just allowances. § 101.

The assignees shall, not sooner than four nor later than twelve

calendar months from the issuing the commission, appoint a public meeting (whereof, and of the purport whereof, they shall give twenty-one days notice in the London Gazette) to make a dividend of the bankrupt's estate, at which meeting all creditors who have not proved their debts may prove the same; and the said commissioners at such meeting shall order such part of the net produce of the bankrupt's estate in the hands of the assignees, as they shall think fit, to be forthwith divided amongst such creditors as have proved their debts under the commission, in proportion to their respective debts; and shall make an order for a dividend in writing under their hands, and shall cause one part of such order to be filed amongst the proceedings under the commission, and shall deliver another part thereof to the assignees; which order shall contain an account of the time and place of making it, of the amount of the debts proved, of the money remaining in the hands of the assignees to be divided, of how much in the pound is then ordered to be paid to every creditor, and of the money allowed by the commissioners to be retained by the assignees, with their reasons for allowing the same to be so retained: and the assignees, in pursuance of such order, (and without any deed of distribution made for that purpose) shall forthwith make such dividend, and shall take receipts in a book to be kept for that purpose from each creditor, for the dividend received by such creditor, and such order and receipt shall be a discharge to every such assignee for so much as he shall pay pursuant to such order; and no dividend shall be declared, unless the accounts of the assignees shall have been first so audited as aforesaid, and such statement delivered by them upon oath. § 102.

No creditor having security for his debt, or having made any attachment in London, or any other place by virtue of any custom there used, of the goods and chattels of the bankrupt, shall receive upon any such security or attachment more than a rateable part of such debt, except in respect of any execution or extent served and levied by seizure upon, or any mortgage of or lien upon any part of the property of such bankrupt before the bankruptcy. § 103.

In all commissions against one or more of the partners of a firm (except in commissions against one of several partners issued previous to this act), where the debt of the petitioning creditor is a joint debt of the bankrupt or bankrupts and any other person or persons, such petitioning creditor shall not receive any dividend out of the separate estate of the bankrupt or bankrupts, until all the separate creditors shall have received the full amount of their respective debts. § 104.

If the bankrupt's estate shall not have been wholly divided upon the first dividend, the assignees shall, within eighteen calendar months after the issuing of the commission, appoint a public meeting (whereof, and of the purport whereof, they shall give twenty-one days notice in the London Gazette) to make a second dividend, when all creditors who have not proved their debts may prove the same; and the commissioners at such meeting, after taking such

audit as hereinbefore directed, shall order the balance in the hands of the assignees to be forthwith divided amongst such of the creditors as shall have proved their debts; and such second dividend shall be final, unless any action at law or suit in equity be depending, or any part of the estate be standing out, not sold or disposed of, or unless some other estate or effects of the bankrupt shall afterwards come to the assignees; in which case they shall, as soon as may be, convert such estate and effects into money, and within two calendar months after the same shall be so converted, divide the same in manner aforesaid. § 105.

If any assignee under any commission of bankrupt shall have, either in his own hands or at any banker's, or otherwise subject to his order or disposition, or to his knowledge in the hands of or in the order and disposition of himself and any co-assignee or assignees, any or either of them, any unclaimed dividend or dividends amounting in the whole to the sum of fifty pounds, and shall not, within six months after the passing of this act, or two calendar months after the expiration of one year after the declaration and order of payment of such dividend or dividends made by the commissioners, either pay to the creditor or creditors entitled thereto, or cause a certificate thereof to be filed in the office of the lord chancellor's secretary of bankrupts, such assignee or assignees shall be charged, in account with the estate of the bankrupt, interest upon such unclaimed dividend or dividends, to be computed from the time that such certificate is hereby directed to be filed, at the rate of five pounds per centum per annum for such time as he shall thenceforth retain the same, and also such further sum as the commissioners shall think fit, not exceeding in the whole twenty pounds per centum per annum; and the commissioners may order the investment of any unclaimed dividends in the public funds, or in any government security, for or on account of the creditors entitled, and subject to such order as the lord chancellor may think fit to make respecting the same, who, if he shall think fit, may, after the same shall have remained unclaimed for the space of three years from the declaration of such dividends by the commissioners, order the same to be divided amongst and paid to the other creditors; and the proof of the creditors to whom such dividends were allotted shall from thenceforth be considered as void as to the same, but renewable as to any future dividends to place them *pari passu* with the other creditors, but not to disturb any dividends which shall have been previously made. § 106.

No action for any dividend shall be brought against the assignees by any creditor; but if the assignees shall refuse to pay any such dividend, the lord chancellor may, on petition, order payment thereof, with interest for the time that it shall have been withheld, and the costs of the application. § 107.

Of the Bankrupt.

If any bankrupt shall not, before three o'clock in the afternoon of the forty-second day after he shall have been declared bankrupt,

notice thereof in writing having been first left at his usual place of abode, or served upon him in case he was in prison, and notice given in the London Gazette of the issuing of the commission, and of the meetings of the commissioners, surrender himself to them, and sign and subscribe such surrender, and submit to be examined before them from time to time upon oath, or being a Quaker, upon solemn affirmation; or if any such bankrupt upon such examination shall not discover all his real or personal estate, and how, and to whom, upon what consideration, and when he disposed of, assigned, or transferred any of such estate, and all books, papers, and writings relating thereunto, except such part as shall have been really and *bonâ fide* before sold or disposed of in the way of his trade, or laid out in the ordinary expence of his family; or if any such bankrupt shall not upon such examination deliver up to the commissioners all such part of such estate, and all books, papers, and writings relating thereunto, as be in his possession, custody, or power (except the necessary wearing apparel of himself, his wife and children); or if any such bankrupt shall remove, conceal, or embezzle any part of such estate, to the value of ten pounds, or any books of account, papers, or writings relating thereto, with intent to defraud his creditors, every such bankrupt shall be deemed guilty of felony, and be liable to be transported for life, or for such term, not less than seven years, as the court before which he shall be convicted shall adjudge; or shall be liable to be imprisoned only, or imprisoned and kept to hard labour in any common gaol, penitentiary house, or house of correction, for any term not exceeding seven years. § 108.

And the lord chancellor may, as often as he shall think fit, from time to time enlarge the time for the bankrupt surrendering himself, for such time as the lord chancellor shall think fit, so as every such order be made six days at least before the day on which such bankrupt was to surrender himself. § 109.

And the commissioners before the choice of assignees, and after such choice the assignees, with the approbation of the commissioners, testified in writing under their hands, may from time to time make such allowance to the bankrupt out of his estate, until he shall have passed his last examination, as the said assignees shall think necessary for the support of himself and his family. § 110.

And if any bankrupt apprehended by any warrant of the commissioners shall, within the time hereby allowed for him to surrender, submit to be examined, and in all things conform, he shall have the same benefit as if he had voluntarily surrendered. § 111.

The bankrupt, after the choice of assignees, shall (if thereto required) forthwith deliver up to them, upon oath, before a master ordinary or extraordinary in chancery, or justice of the peace, all books of account, papers, and writings relating to his estate in his custody or power, and discover such as are in the custody or power of any other person; and every bankrupt not in prison or

custody shall, at all times after such surrender, attend such assignees upon every reasonable notice in writing for that purpose given by them to him, or left at his house, and shall assist such assignees in making out the accounts of his estate; and such bankrupt after he shall have surrendered, may, at all seasonable times before the expiration of the said forty-two days, or such further time as shall be allowed to him to finish his examination, inspect his books, papers, and writings in the presence of his assignees, or any person appointed by them, and bring with him each time any two persons to assist him; and after he shall have obtained his certificate, shall, upon demand in writing given to him, or left at his usual place of abode, attend the assignees, to settle any accounts between his estate and any debtor to or creditor thereof, or attend any court of record to give evidence touching the same, or do any act necessary for getting in the said estate; for which attendance he shall be paid five shillings per day by the assignees out of his estate; and if such bankrupt shall, after such demand as aforesaid, not attend, or on such attendance refuse to do any of the matters aforesaid, without sufficient cause shewn to the commissioners for such refusal, and by them allowed, the assignees making proof thereof upon oath before the commissioners, the said commissioners may, by warrant directed to such person as they shall think proper, cause such bankrupt to be apprehended, and committed to the county gaol, there to remain until he shall conform to the satisfaction of the said commissioners, or of the lord chancellor. § 112.

The bankrupt shall be free from arrest or imprisonment by any creditor in coming to surrender, and after such surrender during the said forty-two days, and such further time as shall be allowed him for finishing his examination, provided he was not in custody at the time of such surrender; and if such bankrupt shall be arrested for debt, or on any escape warrant, in coming to surrender, or shall after his surrender be so arrested within the time aforesaid, he shall, on producing the summons under the hands of the commissioners to the officer who shall arrest him, and giving such officer a copy thereof, be immediately discharged; and if any officer shall detain any such bankrupt after he shall have shewn such summons to him, so signed as aforesaid, such officer shall forfeit to such bankrupt, for his own use, the sum of five pounds for every day he shall detain such bankrupt, to be recovered by action of debt in any court of record at Westminster, in the name of such bankrupt, with full costs of suit. § 113.

The commissioners may, at the time appointed for the last examination of the bankrupt, or any enlargement or adjournment thereof, adjourn such examination *sine die*; and he shall be free from arrest or imprisonment for such time not exceeding three calendar months, as they shall, by indorsement upon such summons as aforesaid, appoint, with like penalty upon any officer detaining such bankrupt after having been shewn such summons. § 114.

Whenever any bankrupt is in prison or in custody, under any process, attachment, execution, commitment, or sentence, the commissioners may, by warrant under their hands directed to the person in whose custody such bankrupt is confined, cause such bankrupt to be brought before them at any meeting either public or private; and if any such bankrupt is desirous to surrender, he shall be so brought up, and the expence thereof shall be paid out of his estate, and such person shall be indemnified by the warrant of the commissioners for bringing up such bankrupt; provided that the assignees may appoint any persons to attend such bankrupt from time to time, and to produce to him his books, papers, and writings, in order to prepare an abstract of his accounts and statement, to shew the particulars of his estate and effects previous to his final examination and discovery thereof, a copy of which abstract and statement the said bankrupt shall deliver to them ten days at least before his last examination. § 115.

Any person wilfully concealing any real or personal estate of the bankrupt, and who shall not, within forty-two days after the issuing of the commission, discover such estate to one or more of the commissioners or assignees, shall forfeit the sum of 100*l.* and double the value of the estate so concealed; and any person who shall, after the time allowed to the bankrupt to surrender, voluntarily discover to one or more of the commissioners or assignees any part of such bankrupt's estate, not before come to the knowledge of the assignees, shall be allowed five per cent. thereupon, and such further reward as the major part in value of the creditors present at any meeting called for that purpose shall think fit, to be paid out of the estate recovered on such discovery. § 116.

Of the Certificate.

And every bankrupt who shall have duly surrendered, and in all things conformed himself to the laws in force concerning bankrupts at the time of issuing the commission against him, shall be discharged from all debts due by him when he became bankrupt, and from all claims and demands hereby made proveable under the commission, in case he shall obtain a certificate of such conformity so signed and allowed, and subject to such provisions as hereinafter directed; but no such certificate shall release or discharge any person who was partner with such bankrupt at the time of his bankruptcy, or who was then jointly bound, or had made any joint contract with such bankrupt. § 117.

And such certificate shall be signed by four-fifths in number and value of the creditors of the bankrupt, who shall have proved debts under the commission to the amount of twenty pounds or upwards, who shall thereby testify their consent to the bankrupt's discharge as aforesaid; and no such certificate shall be such discharge, unless the commissioners shall, in writing under their hands and seals, certify to the lord chancellor that such bankrupt has made a full discovery of his estate and effects, and in

all things conformed as aforesaid; and that there does not appear any reason to doubt the truth or fulness of such discovery, and also that the creditors have signed in manner hereby directed; and unless the bankrupt make oath in writing that such certificate and consent were obtained without fraud; and unless such certificate shall, after such oath, be allowed by the lord chancellor, against which allowance any of the creditors of the bankrupt may be heard before the lord chancellor. § 118.

Provided, that certificates of conformity which now have been or shall be signed by three-fifths in number and value of such creditors as aforesaid, of any bankrupt against whom any commission shall have issued before the time of passing this act, may be signed by the commissioners and allowed by the lord chancellor: provided also, that after six calendar months from the last examination of any bankrupt under any commission issued after the passing of this act, such certificate may be signed by the commissioners, and allowed in manner aforesaid, and shall be such discharge as aforesaid, if it shall have been signed by three-fifths in number and value of creditors as aforesaid, or by nine-tenths in number of such creditors. § 119.

Provided also, that after eighteen calendar months from the last examination of any bankrupt under a commission issued, either previously to or after the passing of this act, if three-fifths in number and value of such creditors, with the exception of one whose signature is necessary in respect of number or value, or if nine-tenths in number with the exception of one whose signature is necessary to make up that proportion, shall have signed the certificate, the commissioners may sign the same, and the bankrupt may thereupon petition the lord chancellor for the allowance thereof, having first caused every creditor who shall not have signed, and whose signature shall be so necessary as aforesaid, to be served with a copy of such petition, who may be heard against such allowance; and every such certificate, if allowed by the lord chancellor, shall be a valid discharge as aforesaid. § 120.

The commissioners shall not sign any certificate, unless they shall have proof by affidavit in writing of the signature of the creditors thereto, and of any person thereto authorized by any creditor, and of the authority by which such person shall have so signed; and if any creditor reside abroad, the authority of such creditors shall be attested by a notary public; and every such affidavit, authority, and attestation shall be laid before the lord chancellor, with the certificate, previous to the allowance thereof. § 121.

And any contract or security made or given by any bankrupt or other person unto or in trust for any creditor, or for securing the payment of any money due by such bankrupt at his bankruptcy, as a consideration or with intent to persuade such creditor to consent to or sign such certificate, shall be void, and the money thereby secured or agreed to be paid shall not be re-

coverable, and the party sued on such contract or security may plead the general issue, and give this act and the special matter in evidence. § 122.

And any bankrupt who shall, after his certificate shall have been allowed, be arrested or have any action brought against him for any debt due by him before his bankruptcy, shall be discharged upon common bail, and may plead in general that the cause of action accrued before he became bankrupt, and may give this act and the special matter in evidence; and such bankrupt's certificate, and the allowance thereof, shall be sufficient evidence of the trading, bankruptcy, commission, and other proceedings precedent to the obtaining such certificate; and if any such bankrupt shall be taken in execution or detained in prison for any debt owing before he became bankrupt, where judgment has been obtained before the allowance of his certificate, any judge of the court wherein judgment has been so obtained may, on such bankrupt's producing his certificate, order any officer who shall have such bankrupt in custody by virtue of such execution, to discharge such bankrupt without exacting any fee, and such officer shall be hereby indemnified for so doing. § 123.

And if any person who shall have been so discharged by such certificate as aforesaid, or who shall have compounded with his creditors, or who shall have been discharged by any insolvent act, shall become bankrupt, and obtain such certificate as aforesaid, unless his estate shall produce, after all charges, sufficient to pay every creditor under the commission fifteen shillings in the pound, such certificate shall only protect his person from arrest and imprisonment, but his future estate and effects (except his tools of trade and necessary household furniture, and the wearing apparel of himself, his wife, and children) shall vest in the assignees under the said commission, who shall be entitled to seize the same in like manner as they might have seized property of which such bankrupt was possessed at the issuing the commission. § 124.

And every bankrupt who shall have obtained his certificate, if the net produce of his estate shall pay the creditors who have proved under the commission ten shillings in the pound, shall be allowed five per cent. out of such produce, to be paid him by the assignees, provided such allowance shall not exceed 40*l.*; and every such bankrupt, if such produce shall pay such creditors twelve shillings and sixpence in the pound, shall be allowed and paid as aforesaid seven pounds ten shillings per cent. provided such allowance shall not exceed 50*l.*; and every such bankrupt, if such produce shall pay such creditors fifteen shillings in the pound, shall be allowed and paid as aforesaid 10*l.* per cent. provided such allowance shall not exceed 60*l.*; but if such produce shall not pay such creditors ten shillings in the pound, such bankrupt shall only be allowed and paid so much as the assignees and commissioners shall think fit, not exceeding 3*l.* per cent. § 125.

And in all joint commissions under which any partner shall have obtained his certificate, if a sufficient dividend shall have been paid upon the joint estate and upon the separate estate of such partner, he shall be entitled to his allowance, although his other partner or partners may not be entitled to any allowance. § 126.

And no bankrupt shall be entitled to his certificate, or to be paid any such allowance, and any certificate, if obtained, shall be void, if such bankrupt shall have lost by any sort of gaming or wagering, in one day, twenty pounds, or within one year next preceding his bankruptcy, two hundred pounds; or if he shall within one year next preceding his bankruptcy have lost two hundred pounds by any contract for the purchase or sale of any government or other stock, where such contract was not to be performed within one week after the contract, or where the stock bought or sold was not actually transferred or delivered in pursuance of such contract; or shall, after an act of bankruptcy committed, have destroyed, altered, mutilated, or falsified, or caused to be destroyed, altered, mutilated, or falsified, any of his books, papers, writings, or securities, or made or been privy to the making of any false or fraudulent entries in any book of account or other document, with intent to defraud his creditors, or shall have concealed property to the value of ten pounds or upwards; or if any person having proved a false debt under the commission, such bankrupt being privy thereto, or if he shall afterwards know the same, not disclosing the same to his assignees within one month after such knowledge. § 127.

And no bankrupt, after his certificate of conformity shall have been allowed under any commission of bankrupt already issued, or hereafter to be issued, shall be liable to pay or satisfy any debt, claim, or demand from which he shall have been discharged by virtue of such certificate, or any part of such debt, claim, or demand upon any contract, promise, or agreement made or to be made after the suing out of the commission, unless such promise, contract, or agreement be made in writing, signed by the bankrupt, or by some person thereto lawfully authorized, in writing, by such bankrupt. § 128.

The assignees shall, upon request made to them by the bankrupt, declare to him how they have disposed of his real and personal estate, and pay the surplus, if any, to such bankrupt, his executors, administrators, or assigns; and every such bankrupt, after the creditors who have proved under the commission shall have been paid, may recover the remainder of the debts due to him; but the assignees shall not pay such surplus, until all creditors who have proved under the commission shall have received interest upon their debts, to be calculated and paid at the rate and in the order following; (that is to say), all creditors whose debts are now by law entitled to carry interest in the event of a surplus, shall first receive interest on such debts at the rate of interest reserved or by law payable thereon, to be calculated from the proof

thereof; and after such interest shall have been paid, all other creditors who have proved under the commission shall receive interest on their debts from the proof, at the rate of four per cent. § 129.

At any meeting of creditors after the bankrupt shall have passed his last examination, whereof and of the purport of which twenty-one days notice shall have been given in the London Gazette, if the bankrupt or his friends shall make an offer of composition, or security for such composition, which nine-tenths in number and value of the creditors assembled at such meeting shall agree to accept, another meeting for the purpose of deciding upon such offer shall be appointed, whereof such notice as aforesaid shall be given; and if at such second meeting nine-tenths in number and value of the creditors then present shall also agree to accept such offer, the lord chancellor may, upon such acceptance being testified by them in writing, supersede the same. § 130.

And in deciding upon such offer as aforesaid, any creditor whose debt is below twenty pounds shall not be reckoned in number, but the debt due to such creditor shall be computed in value; and that any creditor to the amount of fifty pounds and upwards, residing out of England, shall be personally served with a copy of the notice of the meeting to decide upon such offer as aforesaid, and of the purpose for which the same is called, so long before such meeting as that he may have time to vote thereat, and such creditor may vote by letter of attorney executed and attested in manner hereby required for such creditors voting in the choice of assignees; and if any creditor shall agree to accept any gratuity or higher composition for assenting to such offer, he shall forfeit the debt due to him, together with such gratuity or composition; and the bankrupt shall, if thereto required, make oath before the commissioners that there has been no such transaction between him, or any person with his privity, and any of the creditors, and that he has not used any undue means or influence with any of them to attain such assent as aforesaid. § 131.

And this act shall be construed beneficially for creditors, and that nothing herein contained shall alter the present practice in bankruptcy, except where any such alteration is expressly declared; and that it shall extend to aliens, denizens, and women, both to make them subject thereto, and to entitle them to all the benefits given thereby; and that all powers hereby given to, or duties directed to be performed by the lord chancellor, shall and may be exercised or performed by a lord keeper or lords commissioners of the great seal; and all powers given to, or duties directed to be performed by the commissioners or assignees, may be exercised or performed respectively by the major part of the commissioners, or by one assignee where only one shall have been chosen; and nothing herein contained shall render invalid any commission of bankruptcy now subsisting, or which shall be subsisting at the time this act shall take effect, or any proceedings which may have been had, or affect or lessen any right, claim, demand, or

remedy which any person now has thereunder, or upon or against any bankrupt against whom any commission has or shall have issued, except as is herein specifically enacted; and that this act shall not extend either to Scotland or Ireland, except where the same are expressly mentioned. § 132.

And this act shall not, as to any enactments therein contained, take effect before the 1st day of May, 1825; save that so many of such enactments as relate to the certificates of persons becoming bankrupts before this act passed, or who shall become bankrupts before the said first day of May, shall take effect upon the passing of this act.

CHAPTER XVI.*

Of Masters and Workmen.

By the 5 Geo. IV. c. 95. all former laws, statutes, and enactments in force in any part of the United Kingdom, relative to combinations to obtain an advance of wages, or to lessen or alter the hours or duration of the time of working, or to decrease the quantity of work, or to regulate the mode of carrying on any manufacture, trade, or business, or the management thereof; or relative to combinations to lower the rate of wages, or to increase or alter the hours or duration of the time of working, or to increase the quantity of work, or to regulate or controul the mode of carrying on any manufacture, trade, or business, or the management thereof; or to fixing the amount of the wages of labour; or relative to obliging workmen not hired to enter into work, are repealed. § 1.

And journeymen, workmen, or other persons, who shall enter into any combination to obtain an advance or to fix the rate of wages, or to lessen or alter the hours or duration of the time of working, or to decrease the quantity of work, or to induce another to depart from his service before the end of the time or term for which he is hired, or to quit or return his work before the same shall be finished, or not being hired, to refuse to enter into work or employment, or to regulate the mode of carrying on any manufacture, trade, or business, or the management thereof, shall not therefore be subject or liable to any indictment or prosecution for conspiracy, or to any other criminal information or punishment whatever, under the common or the statute law. § 2.

And masters, employers, or other persons, who shall enter into any combination to lower or to fix the rate of wages, or to increase or alter the hours or duration of the time of working, or to increase the quantity of work, or to regulate the mode of carrying on any manufacture, trade, or business, or the management thereof, shall not therefore be subject or liable to any indictment or

prosecution for conspiracy, or to any other criminal information or punishment whatever, under the common or the statute law. § 3.

If any person, by violence to the person or property, by threats or by intimidation, shall wilfully or maliciously force another to depart from his hiring or work before the end of the time or term for which he is hired, or return his work before the same shall be finished, or damnify, spoil, or destroy any machinery, tools, goods, wares, or work, or prevent any person not being hired from accepting any work or employment; or if any person shall wilfully or maliciously use or employ violence to the person or property, threats or intimidation towards another, on account of his not complying with or conforming to any rules, orders, resolutions, or regulations made to obtain an advance of wages, or to lessen or alter the hours of working, or to decrease the quantity of work, or to regulate the mode of carrying on any manufacture, trade, or business, or the management thereof; or if any person, by violence to the person or property, by threats or by intimidation, shall wilfully or maliciously force any master or mistress manufacturer, his or her foreman or agent, to make any alteration in their mode of regulating, managing, conducting, or carrying on their manufacture, trade, or business; every person so offending, or causing, procuring, aiding, abetting, or assisting in such offence, shall be imprisoned only, or imprisoned and kept to hard labour, for any time not exceeding two calendar months. § 5.

If any persons shall combine, and by violence to the person or property, or by threats or intimidation, wilfully and maliciously force another to depart from his service before the end of the time or term for which he or she is hired, or return his or her work before the same shall be finished, or damnify, spoil, or destroy any machinery, tools, goods, wares, or work, or prevent any person not being hired from accepting any work or employment; or if any persons so combined shall wilfully or maliciously use or employ violence to the person or property, or threats or intimidation towards another, on account of his or her not complying with or conforming to any rules, orders, resolutions, or regulations made to obtain an advance of wages, or to lessen or alter the hours of working, or to decrease the quantity of work, or to regulate the mode of carrying on any manufacture, trade, or business, or the management thereof; or if any persons shall combine, and by violence to the person or property, or by threats or intimidation, wilfully or maliciously force any master or mistress manufacturer, his or her foreman, or agent, to make any alteration in their mode of regulating, managing, conducting, or carrying on their manufacture, trade, or business; each and every person so offending, or causing, procuring, aiding, abetting, or assisting in such offence, being convicted thereof in manner hereinafter mentioned, shall be imprisoned only, or imprisoned and kept to hard labour, for any time not exceeding two calendar months: provided

always, that nothing herein contained shall alter or affect any law now in force for the prosecution and punishment of the said several offences; only that a conviction under this act for any of such offences shall exempt the offender from prosecution under any other law or statute. § 6.

Any justice of the peace within his jurisdiction is authorized and required to summon the person or persons charged with any offence included in this act to appear before any two justices at a certain time and place, such place to be as near to the place where the cause of complaint shall have arisen as may be; and if any person or persons so summoned shall not appear, then such justices (proof on oath having been first made before them of the due service of such summons, by delivering the same personally, or leaving the same at the usual place of abode of the parties, provided it shall be left twenty-four hours) shall make and issue their warrant for apprehending them; or it shall be lawful for such justices, without issuing any summons, to make and issue their warrant for apprehending the person or persons, and bringing him or her before them; such justices are authorized and required forthwith to make inquiry touching the matters complained of, and to examine into the same; and upon confession by the party, or proof by two or more credible witnesses upon oath, to convict or acquit the party. § 7.

No justice of the peace, being also a master, or the father or son of any master, in any trade or manufacture, shall act as such under this act. § 7.

It shall be lawful for the justice or justices of the peace, at the request in writing of any of the parties, to summon any witness or witnesses to appear and give evidence; and if any person so summoned shall not appear or offer some reasonable excuse, or appearing shall not submit to be examined, and give his evidence, then it shall be lawful for such justices (proof on oath having been first made of the due service of such summons, by delivering the same to him, or by leaving the same, twenty-four hours before the time appointed, at the usual place of abode of such person) to commit such person to some prison within their jurisdiction, there to remain without bail or mainprize for any time not exceeding two calendar months, or until such person shall submit himself or herself to be examined: provided always, that in case such complaint shall be heard and determined before such offender shall submit to be examined and give evidence, then he, she, or they shall be imprisoned the full term of such commitment. § 9.

Any person offending against this act shall be compellable to give his testimony as a witness on behalf of the crown, prosecutor, or informer, upon any information under this act against any other person not being such witness; but every person having given his testimony as aforesaid shall be indemnified from any information or prosecution for having offended in the matter wherein or relative to which he shall have so given his testimony. § 10.

No appeal shall be allowed against any conviction under this act. § 12.

And no action shall be brought against any person for any matter or thing whatsoever done or committed under or by virtue or in the execution of this act, unless such action shall be brought within six calendar months. § 13.

Arbitration of Disputes.

By the 5 Geo. IV. c. 96. intituled, "*An Act to consolidate and amend the laws relative to the arbitration of disputes between masters and workmen,*" the following acts are repealed: (*vis.*) so much of the 3 Geo. II. (Irish Act,) intituled, "*An Act to prevent unlawful combinations of workmen, artificers, and labourers employed in the several trades and manufactures of this kingdom, and for the better payment of their wages; as also to prevent abuses in making of bricks, and to ascertain their dimensions,*" as relates to the decision of disputes as therein mentioned; the 39 & 40 Geo. III. c. 90. intituled, "*An Act for settling disputes that may arise between masters and workmen engaged in the cotton manufacture in that part of Great Britain called England;*" the 39 & 40 Geo. III. c. 106. intituled, "*An Act to repeal an act passed in the last session of parliament, intituled, 'An act to prevent unlawful combinations of workmen,' and to substitute other provisions in lieu thereof;*" the 41 Geo. III. c. 38. to amend the last-mentioned act; the 43 Geo. III. c. 151. intituled, "*An act for preventing and settling disputes which may arise between masters and weavers engaged in the cotton manufacture in Scotland, and persons employed by such weavers, and persons engaged in ornamenting cotton goods by the needle;*" the 44 Geo. III. c. 87. to amend the 39 & 40 Geo. III. c. 90; and, lastly, the 53 Geo. III. c. 75. intituled, "*An act for the better regulation of the cotton trade in Ireland;*" save and except in as far as the same may have repealed any prior acts or enactments. § 1.

And it is enacted, that the following subjects of dispute arising between masters and workmen, or between workmen and those employed by them, in any trade or manufacture in any part of the United Kingdom of Great Britain and Ireland, may be settled and adjusted in manner hereafter mentioned; (that is to say)—

Disagreements respecting the price to be paid for work done, or in the course of being done, whether such disputes shall happen or arise between them respecting the payment of wages as agreed upon, or the hours of work as agreed upon, or any injury or damage done or alleged to have been done to the work, or respecting any delay or supposed delay in finishing the work, or the not finishing the work in a good and workmanlike manner, or according to any contract, or to bad materials.

Cases where the workmen are to be employed to work any new pattern which shall require them to purchase any new implements of manufacture, or to make any alteration upon the

old implements for the working thereof, and the masters and workmen cannot agree upon the compensation to be made for or in respect thereof.

Disputes respecting the length, breadth, or quality of pieces of goods, or, in case of cotton manufacture, the yarn thereof, or the quantity and quality of the wool.

Disputes respecting the wages or compensation to be paid for pieces of goods that are made of any great or extraordinary length.

Disputes in the cotton manufacture, respecting the manufacture of cravats, shawls, policat, romal, and other handkerchiefs, and the number to be contained in one piece of such handkerchiefs.

Disputes arising out of, for, or touching the particular trade or manufacture, or contracts relative thereto, which cannot be otherwise mutually adjusted and settled.

Disputes between masters and persons engaged in sizing and ornamenting goods.

But nothing in this act shall authorize any justice to establish a rate of wages or price of labour or workmanship at which the workmen shall in future be paid, unless with the mutual consent of both master and workman. Provided always, that all complaints by any workman as to bad materials shall be made within three weeks of his receiving the same; and all complaints arising from any other cause shall be made within six days after such cause shall arise.

And whenever such subjects of dispute shall arise as aforesaid, it shall be lawful for the master and workman, or either of them, to demand and have an arbitration or reference thereof in manner following; (that is to say)—Where the party complaining and the party complained of shall come before or agree by any writing under their hands to abide by the determination of any justice of the peace, it shall be lawful for such justice to hear and finally determine, in a summary manner, the matter in dispute between them; but if such parties shall not so agree to abide by the determination of such justice or magistrate, then it shall be lawful for any such justice or magistrate, on complaint made before him, and proof by the examination of the party, that application has been made to the person or persons against whom such cause of complaint has arisen, or his, her, or their agent, to settle such dispute, and that the same has not been settled, or, where the dispute relates to a bad warp, that such cause of complaint has not been done away with within forty-eight hours after such application, to summon before him such person or persons, on some day not exceeding three days (exclusive of Sunday) after the making of such complaint; and if at such time and place the person or persons so summoned shall not appear, or send some person on his, her, or their behalf, or appearing, shall not do away such cause of complaint, it shall be lawful for such justice, at the request of either of such parties, to nominate arbitrators or referees

for settling the matters in dispute; and such justice shall propose not less than four nor more than six persons, one half of whom shall be master manufacturers, or agents or foremen of some master manufacturer, and the other half workmen in such manufacture, (such respective persons residing in or near to the place where such disputes shall have arisen) out of which master manufacturers, agents, or foremen, the master engaged in such dispute, or his agent, shall choose one, and out of which workmen the workman or his agent shall choose another, who shall have full power to hear and finally determine such dispute. § 3.

In case any of the persons so proposed shall refuse or delay to accept such arbitration, or accepting shall not act therein, within two days after such nomination, the justice shall proceed to name another or other persons; and in every case of a second nomination, the arbitrators shall meet within twenty-four hours after the application for the same, and at the same place at which the meeting of the referees first named was appointed, or at some other convenient place as the justice may appoint; and the expence of every such application for the appointment of a second referee shall be borne and defrayed by the party through whose default, or the default of whose referee, such application is rendered necessary; and in every case where a second arbitrator shall be appointed and shall not attend, it shall be lawful for the other arbitrator to proceed by himself to the hearing and determining of the same matters in dispute; and in such case the award of such sole arbitrator shall be final and conclusive, without being subject to review, appeal, or suspension. § 4.

The arbitrators or referees being so nominated, the said justice shall appoint a place of meeting, and also a day for the meeting, notice of which shall thereupon be given by such justice to the persons so nominated, and to any party to any such dispute, who may not have attended the meeting before such justice as aforesaid. And the person so appointed shall hear and examine the parties and their witnesses, and determine such dispute within two days after such nomination, exclusive of Sundays; and the determination of such arbitrators shall be final and conclusive. § 5.

In all cases where complaints are made respecting bad warps or utensils by workmen, the place of meeting of the referees shall be at or as near as may be to the place where the work shall be carrying on; and in all other cases, at or as near as may be to the place or places where the work has been given out. § 6.

If any person so complaining shall not attend, or send some person on his or her behalf, at the time and place appointed, such person shall not be entitled to the benefit of this act; and if any person against whom any such complaint shall have been made shall not attend, or send some person on his or her behalf, the justice of the peace shall thereupon nominate a person for him out of such persons so proposed as aforesaid. § 7.

And it shall be lawful for any arbitrator or referee, at the request in writing of any of the parties, to issue his or their sum-

mons to any witness or witnesses to appear and give evidence; and if any person so summoned shall not appear, or offer some reasonable excuse, or appearing, shall not submit to be examined, then it shall be lawful for any one or more of his majesty's justices of the peace (proof on oath having been first made of the due service of such summons, by delivering or leaving the same twenty-four hours before the time appointed, at the usual place of abode of such person) to commit any such person to some prison within the jurisdiction of any such justice, there to remain without bail or mainprize for any time not exceeding two calendar months nor less than seven days, or until such person shall submit himself to be examined, and give his evidence: provided always, that in case such dispute shall be heard and determined before such offender shall submit to be examined and give evidence, then he, she, or they shall be imprisoned the full term of such commitment. § 9.

And in case such arbitrators and referees cannot agree, or shall not make and sign their award within three days after the date of the order certifying their appointment, then they shall, without delay, go before the justice, and in case of his absence or indisposition, before any other of his majesty's justices of the peace residing nearest to the place where the meeting shall have taken place, and shall state the points in difference between them, which the said justice or justices shall hear and determine; and the said justice or justices are directed and required to settle and determine the matter in dispute within the space of two days after the expiration of the time allowed to the arbitrators and referees; and the determination of such justice or justices shall be final and conclusive, without being subject to review or challenge by any court whatsoever. § 10.

And if either arbitrator or referee shall neglect or refuse to go before such justice, it shall be lawful for such justice, after summoning the arbitrators to attend, to determine the matter, upon the statement of either of the arbitrators who shall come before him. § 11.

No justice of the peace, being also a master manufacturer or agent, shall act as such justice under this act. § 12.

And it is further enacted, that, as well in all such cases of dispute as aforesaid as in all other cases, if the parties mutually agree that the matter in dispute shall be arbitrated and determined in a different mode to the one hereby prescribed, such agreement shall be valid, and the award and determination thereon final and conclusive between the parties. § 13.

Provided, that where any work shall have been delivered to any workman by the agent or servant of any master, to be when finished delivered to such agent or servant; and also where two or more persons shall carry on the business of such manufacture as partners, in every such case respectively the like proceedings shall be had and made against such agent, servant, or any partner, and shall be as effectual as if the same had been had and made against the

principal, or all the partners; and all the said persons respectively shall obey the award made thereupon, and all such order or orders as shall be made by the said justices in or respecting the matters in dispute, and shall be subject to the same proceedings and consequences for refusing or delaying to abide by or perform the same, as if the proceedings had been had against the principal, or against all the partners. § 14.

And it shall be lawful in all cases for any master or workman, by writing under his hand, to authorize any person to act for him in submitting to arbitration and attending arbitrators or justices. § 15.

In all cases where any proceedings may be had against a master or masters under this act, or where such proceedings shall have been commenced, and the master or masters shall become or be bankrupt, or any assignment of his or their estate or effects shall have been made under the said bankruptcy, or otherwise by deed or in law, the factor or trustee upon, or the assignee or assignees of such estate or effects shall be liable to the proceedings authorized by this act against the master or masters, as fully as the master or masters was or were before the bankruptcy or assignment; provided, that all sums of money to be paid in pursuance of such award or orders shall be recoverable only out of the estate or effects of such master or masters, and not out of the proper money of such factor, trustee, assignee or assignees. § 16.

Where any married woman, or infant under the age of twenty-one years, shall have cause of complaint in any of the cases provided for by this act, such complaint may be lodged, and all further proceedings thereupon had, by and in the name of the husband of such married woman, and of the father, or, if dead, of the mother, or if on the death of both parents, of any of the kindred of any such infant, or of the surety or sureties in any indenture of apprenticeship of any such infant, being an apprentice, or of any person nominated by such infant, if he or she shall not have parent, kindred, or surety. § 17.

And it is further enacted, that with every piece of work given out by the manufacturer to a workman to be done, there shall (if both parties are agreed) be delivered a note or ticket, in such form as the said parties shall mutually agree upon; and which said note or ticket, in the event of dispute, shall be evidence of all matters and things mentioned therein. § 18.

A duplicate of every such note or ticket shall be made and kept by the master or agent, which duplicate shall be evidence, in case the workman shall not produce to the arbitrators, or the said justice, the said note or ticket. § 19.

And it shall not be allowable to any manufacturer; who shall have received into his possession any article without objection made within twenty-four hours by himself, or his clerk or foreman, afterwards to make any complaint on account of work so received. § 20.

If the parties by and between whom the said reference shall

take place, shall think it expedient, or be desirous to extend the time limited for the making the award or umpirage, it shall and may be lawful for them to extend the same. § 21.

Upon fulfilment of the award or umpirage, the same shall be acknowledged by the party in whose behalf the same was made, by an acknowledgment at the foot of the said award. § 23.

If any party shall refuse or delay to fulfil an award under this act, for the space or term of two days after the same shall have been reduced into writing, it shall be lawful for any such justice, on the application of the party aggrieved, by warrant under his hand, to cause the sum and sums of money directed to be paid by any such award to be levied by distress, together with all costs and charges attending such distress and sale; and in case it shall appear by any return to such warrant that no sufficient distress can be really had, it shall be lawful for any such justice, by warrant under his hand, to commit the person or persons so liable as aforesaid to the common gaol, or some house of correction within his or their jurisdiction, there to remain without bail for any time not exceeding three months. § 24.

And whereas cases may occur, where the recovery of such sum or sums of money by distress and sale of the goods and chattels of the defaulter may appear to the justice of the peace to be attended with consequences ruinous, or in an especial manner injurious to the defaulter and his family; to prevent which consequences, it is further enacted, that the said justice, in all such cases, shall withhold such warrant, and commit the defaulter to the common gaol or some house of correction, there to remain without bail for any time not exceeding three months. § 25.

And where any person shall be committed to prison for refusing or delaying to fulfil an award as aforesaid, and such person shall, at any time during the period of his or her imprisonment, pay to the governor or keeper of the prison the full amount of the sum awarded, with all reasonable expences incurred through such refusal or delay, it shall be lawful for such governor or keeper to discharge such person. § 26.

No appeal or certiorari shall lie against any proceedings under this act; and no proceedings under this act shall be invalid for want of form. § 28, 29.

All costs, time, and expences attending the application to justices, and of the arbitration, shall be settled by the arbitrators; and where the same shall be determined by any justice of the peace, then the costs, time, and expences aforesaid shall be settled by such justice; and where the arbitrators cannot agree as to the costs, time, and expences to be allowed, the same shall be settled by the justice of the peace, and in case of his absence or indisposition, by any justice of the peace for the same county, stewardry, riding, division, barony, city, burgh, liberty, town, or place nearest to the place at which the arbitrators met to settle the dispute: provided always, that no master manufacturer, his foreman or agent, shall in any case be allowed for costs, time, or expences,

unless it shall appear that the proceedings of the workmen were vexatious and oppressive. § 31.

And every agreement, submission, award, ticket, matter, or thing, under and by virtue of this act, or relating to any other mode of arbitration as aforesaid, shall and may be drawn up and written upon unstamped paper. § 22.

No action shall be brought against any arbitrator, justice of the peace, constable, headborough, or other officer, or any other person, for any matter or thing whatsoever done in the execution of this act, unless such action shall be brought within six calendar months next after the doing or committing of such matter or thing. § 33.

And if any action or suit shall hereafter be commenced or prosecuted against any person for any thing done in the execution of this act, such person may plead the general issue, and give this act and the special matter in evidence; and if the plaintiff shall become nonsuited, or suffer discontinuance, or forbear further prosecution, or if judgment shall be given for the defendant, such defendant shall recover his, her, or their full costs. § 34.

CHAPTER XVII.

Of Award.

THAT act by which parties refer any matter in dispute between them to the private decision of another party (whether one person or more) is called a *submission*; the party to whom a reference is made, an *arbitrator* or *arbitrators*; when the reference is made to more than one person, and provision made that in case they shall disagree another shall decide, that other is called an *umpire*. The judgment given, or determination made, by an arbitrator or arbitrators, is termed an *award*; that by an umpire, an *umpirage*, or less correctly an *award*.

The extent of the submission may be various, according to the pleasure of the parties; it may be of one particular matter, or of many, or of every subject of litigation between them.

It is proper to fix a time within which the arbitrators shall pronounce their award; but when the submission limits no time for the making of the award, that shall be understood to be within a convenient time; and if in such a case the party request the arbitrators to make an award, and they do not, a revocation of the authority afterwards will be no breach of the condition.

Every one who is capable of making a disposition of his property, or a release of his right, may make a submission to an award; but no one can, who is under a natural incapacity of contracting. Therefore neither a married woman nor an infant

can be a party to a submission ; but in the former case the husband must submit for his wife ; and in the latter, the guardian for the infant.

An executor or administrator may submit a matter in dispute between another and himself, in right of his testator and intestate : but it is at his own peril : for if the arbitrator do not give him the same measure of justice as he would be entitled to at law, he must account for the deficiency to those interested in the effects.

So the assignees of a bankrupt may submit to arbitration any disputes between their bankrupt and others, provided they pursue the directions of the 5 Geo. II. c. 30. § 34.

An award creates a duty which survives to executors or administrators ; they shall therefore, on the one hand, be compelled to the performance, if made against their testator or intestate ; and on the other hand, they may take advantage of it, if made in his favour.

Though the courts have at all times manifested a general disposition to give efficacy to awards, yet there are some cases in which they have refused them their protection ; because the subjects on which they were made were not the proper objects of reference.

The only motive which can influence a man to refer any subject of dispute to the decision of an arbitrary judge, is to have an amicable and easy settlement of something, which in its nature is uncertain. An award, therefore, is of no avail when made of debt on a bond for the payment of a sum certain, whether it be single or with a condition to be void on the payment of a less sum ; nor if made of debt for arrears of rent ascertained by a lease ; nor of covenant to pay a certain sum of money ; nor of debt on the arrears of an account ; nor of damages recovered by a judgment : for in all these cases the demand is ascertained. But when certain demands are joined with other demands of an uncertain nature, it seems that those which are certain may also be submitted, even in the case of a verdict and judgment.

But in general, where the party complaining could recover by action only uncertain damages, the subject of complaint may be the object of a reference to arbitration ; as any demand not ascertained by the agreements or contract of the parties, though the claimant demand a sum certain. So an action of account may be submitted ; for till the account be taken, the sum remains uncertain.

It is said, and it appears justly, that all kinds of personal wrong, the compensation for which is always uncertain, depending on the verdict of a jury, may be submitted to arbitration, where the injury done to the individual is not considered by the policy of the state as merged in the public crime ; which latter can never be the subject of arbitration.

In the case of deeds, when no certain duty accrues by the deed alone, but the demand arises from a wrong or default subsequent,

together with the deed, as in the case of a bond to perform covenants, or a covenant to repair a house, there the demand being for damages for a breach, may be submitted to award. However, in all cases where the demand arises on a deed, the submission ought also to be by deed; because a specialty cannot be answered but by a specialty.

Much doubt and uncertainty seems anciently to have prevailed on the question, "how far a dispute concerning land could be referred to an arbitrator; and how far, on an actual reference, the parties were bound by his award." But it appears that the real difficulty was how to enforce an award made on a reference of a dispute concerning land; for whenever the submission was by bond, it was almost universally held that the party who did not perform the award, forfeited the bond.

The present rule of law, therefore, is, that "where the parties might by their own act have transferred real property, or exercised any act of ownership with respect to it, they may refer any dispute concerning it to the decision of a third person, who may order the same acts to be done, which the parties themselves might do by their agreement.

As real property cannot be transferred by the parties themselves without deed, wherever that makes a part of the dispute, the submission, as well as the award, as also whatever act is by the award directed to be performed by the parties as to real property, must also be by deed.

Every one whom the law supposes free and capable of judging, whatever may be his character for integrity and wisdom, may be an arbitrator or umpire.

But neither an infant, a married woman, nor a man attainted of treason or felony, can be an arbitrator.

It is a general rule of law, founded on the first principle of natural justice, that a man cannot take upon himself to be judge in his own cause; but should he be nominated an arbitrator by or with the consent of the opposite party, the objection is waived, and the award shall be valid.

The nomination of the umpire is either made by the parties themselves at the time of their submission, or left to the discretion of the arbitrators. Where two arbitrators (as is most frequently the case) have this power, the law provides that the choice shall be fair and impartial; and that it shall not even be left to chance, an election being the act of the will and understanding.

There is no part of the law relative to awards in which so much uncertainty and confusion appear in the reported cases, as on this respecting the umpire. The time when the power of the arbitrators ceases, and that of the umpire begins; the time when the umpire may be nominated; and the effect of the nomination, have, each in its turn, proved questions of sufficient magnitude to exercise and distract the genius of lawyers. The time limited for the umpire to make his umpirage has sometimes been the same as that limited for the arbitrators to make their award. It

is now, however, most usual, and certainly more correct, to prolong the time beyond that period.

In the case of a prolongation of time, the authority of the arbitrators is determined, and that of the umpire immediately begins, on the expiration of the time specified to be allowed to the arbitrators.

The point on which, on all the forms of submission, the greatest difficulty has been felt, has been to decide whether any conduct of the arbitrators can authorize the umpire to make his umpirage before the expiration of the time limited for their making their award.

On this head the following seems to be undeniably the clearest and most accurate opinion. If the arbitrators do in fact make an award within the time allowed them, that shall be considered as the real award; if they make none, then the umpirage shall take place: and there is here no confusion as to the concurrence of authority with respect to the time. The umpire has no concurrence absolutely, but only conditionally, if the arbitrators make no award within their time. This applies equally to the cases where the umpire is confined to the same time with the arbitrators, and to that where a farther time is given to him.

It is now finally determined, that the arbitrators may nominate an umpire before they proceed to consider the subject referred to them: and that this is so far from putting an end to their authority, that it is the fairest way of choosing an umpire. And it is, in fact, not unusual for the parties to make it a condition in the submission, that the umpire shall be chosen by the arbitrators before they do any other act. They may also, when a further day is given to the umpire, and the choice left to them in general terms, choose him at any time after the expiration of their own time, provided it be before the time limited for him.

From the opinion, that the arbitrators having once elected an umpire had executed their authority, it has been thought to follow as a necessary consequence, that if they elected one who refused to undertake the business, they could not elect another. But this opinion has been overruled.

When the person to whom the parties have agreed to refer the matter in dispute between them has consented to undertake the office, he ought to appoint a time and place for examining the matter, and to give notice of such appointment to the parties, or to their attorneys. If the submission be by rule of reference at *nisi prius*, the witnesses should be sworn at the bar of the court, or afterwards (if neglected) before a judge.

The parties must attend the arbitrators according to the appointment, either in person or by attorney, with their witnesses and documents. The arbitrators may also, if they think proper, examine the parties themselves, and call for any other information.

Where a time is limited for making the award, it cannot be made after that time, unless it be prolonged. When the submission is

by the mere act of the parties, the prolongation may be made by mutual consent; otherwise a rule of court is necessary for that purpose.

The law has secured each of the parties against the voluntary procrastination of the other, by permitting the arbitrator, on due notice given, to proceed without his attendance; or the willing party may press his opponent by rule of court to attend the arbitrator, who, on failure, may award without such attendance.

It has been formerly held, that an umpire cannot proceed upon the report of the arbitrators, but must hear the whole matter anew; but there seems to be no good reason why the umpire, if he think proper, may not take those points upon which the arbitrators agree to be as they report them. The nature of his duty is only to make a final determination on the whole subject of dispute, where the arbitrators cannot do it; and by adopting their opinion as far as they do agree, and incorporating it with his own on the other points, he effectually makes that final determination. And in this manner umpires do usually act; and they are justified in so doing, unless requested to re-examine the witnesses.

Though the words in the submission which regulates the appointment of an umpire be not perfectly correct, but might, from the grammatical order, seem to imply that the arbitrators and the umpire should all join together to make an award, yet an award made by the arbitrators without the participation of the umpire, will be considered as satisfying the terms of the submission. And on the other hand, an umpirage made by the umpire jointly with the arbitrators is good; their approbation, shewn by joining with him, being mere surplusage, does not render the instrument purporting to be his umpirage in any degree less the act of his judgment.

Unless it be expressly provided in the submission, that a less number than all the arbitrators named may make the award, the concurrence of all is necessary: and where such a proviso is made, all must be present, unless those who do not attend had proper and sufficient notice, and are wilfully absent.

As to the necessity imposed on the arbitrators or umpire of giving notice of their award, the following are the clearest determinations. If the award be made before the day limited in the submission, the parties shall not be bound by any thing awarded to be done before that day, unless they have notice; but they must take notice at their peril of any thing ordered at the day.

It has long been the practice to guard against the consequences of the want of notice, by inserting a proviso in the condition of the arbitration bond, not only that the award shall be made, but that it shall be delivered to the party by a certain day; and then the bond will not be forfeited by non-performance, unless the party not performing had notice; and the award ought to be delivered to all the persons who are parties on either side.

The object of every reference is a final and certain determination of the controversies referred. A reservation of any point for the future decision of the arbitrator, or of a power to alter

the award, is inconsistent with that object; and therefore it is established as a general rule, that such a reservation is void: but the reservation of a mere ministerial act, as the measuring land, the calculation of interest at a settled rate, &c. does not vitiate the award.

The submission to the decision of an individual arises from the confidence which the parties repose in his integrity and skill, and is merely personal to him: it is therefore inconsistent that the arbitrators or umpire should delegate any part of their authority to another, and such delegation is absolutely void. But it was settled in the case of *Lingwood v. Eade*, that arbitrators, where they award the *substance* of things to be done, may refer it to another to settle the *manner* in which it shall be put in execution.

Since the introduction of references at *nisi prius*, there can be no question but the arbitrator has a jurisdiction over the costs of the action, as well as over the subject of the action itself; unless some particular provision be made to the contrary by the form of the submission. Instead of ascertaining the costs, the arbitrator may refer them to be taxed by the proper officer of the court, but by no one else. If the arbitrator take no notice of the costs, but award mutual releases, it shall be presumed to be meant that each party shall pay his own costs.

Of the award or umpirage.—Every award should be consistent with the terms of the submission; the whole authority of the arbitrators being derived from thence. Therefore the award must not extend to any matter not comprehended in the submission; thus, if the submission be confined to a particular subject of dispute, while there are other things in controversy between the parties, an award which extends to any of these other things is void as far as it respects them.

If the reference be “of all matters in dispute in the cause between the parties,” the power of the arbitrators is confined solely to the matters in dispute in that suit.” If it be “of all matters in difference between the parties in the suit,” his power is not confined to the subject of that particular cause, but extends to every matter in dispute between them.

The award should not extend to any one who is a stranger (that is, not a party) to the submission. Thus, if two submit to arbitration concerning the title to certain lands, and the arbitrators award that all controversies touching the lands shall cease; and that one of the parties, his wife and son, or his heir apparent, by his procurement, shall make to the other such assurance of the land as the other shall require, this is void; because the wife and son are strangers to the submission.

The award ought not to be of part only of the things submitted. This, however, must be understood with a considerable degree of limitation; for though the words of the submission be more comprehensive than those of the award, yet if it do not appear that any thing else was in dispute between the parties besides what is comprehended in the award, it will be good.

If a submission be "of all the premises, or of any part of them," in this case the arbitrator may undoubtedly make an award of part only.

Where the submission is general, "of all matters in difference between the parties," though there should happen to be many subjects of controversy between them, if only one be signified to the arbitrator, he may make his award of that: he is, in the language of Lord Coke, in the place of a judge; and his office is to determine according to what is alleged and proved. It is the business of the parties grieved, who know their own particular grievances, to signify their causes of controversy to the arbitrator; for he is a stranger, and cannot know any thing of their disputes but what is laid before him.

In the case of such a general submission, if an award concerning one thing only be made, it shall be presumed (till the contrary be shewn by the party objecting) that nothing else was referred. But the arbitrators ought to decide on all matters laid before them, or they cannot do complete justice.

It is, however, no valid objection to an award, that the arbitrator had notice of a certain demand, and that he made no award of that, if in other respects the award be good; as, though the sum in question may not be mentioned in the award, the arbitrator may have shewn his opinion that the demand was unfounded.

If an award be to do any thing which is against law, it is void, and the parties are not bound to perform it. So also is an award of a thing which is not physically or morally possible, or in the power of the party to perform, as that he shall deliver up a deed which is in the power and custody of a person over whom he has no controul. And an award, that the defendant shall be bound with sureties such as the plaintiff shall approve, is void; for it may be impossible to force the approbation of the plaintiff. But in this case the party should enter into a bond, and tender it to the plaintiff.

When an award is, that one of the parties should procure a stranger to do a thing, there is a distinction taken between the case where he has no power over the stranger to compel him, and where he has power, either by the common law or by bill in equity. In the former case, the award is void for so much as concerns the stranger; in the latter, it is good.

Neither must an award be to do any thing unreasonable, or by the performance of which the party awarded to do the acts may subject himself to an action from another.

The award must be certain and final. As the intention of the parties in submitting their disputes to arbitration is to have something ascertained which was uncertain before, it is a positive rule, that the award ought to be plainly expressed, that the parties may certainly know what it is they are ordered to do.

On the construction of certainty and uncertainty, the cases are multifarious; and it may be observed, that they principally depend on such circumstances as are peculiar to each case, and very sel-

dom form any general precedent. The rule, therefore, serves better to regulate the conduct of arbitrators, than the numerous exceptions. As it is the interest of the party against whom the award is made to be ingenious in finding out objections, an award cannot be too particular or precise in laying down what is to be done by the parties, and the manner, time, and place of their doing it: for though the two latter have been deemed immaterial, yet it is safer to specify them.

Awards are now so liberally construed, that trifling objections are not suffered to prevail against the manifest intention of the parties. In favour of the equitable jurisdiction of the arbitrators, if that to which the objection of uncertainty is made can be ascertained, either by the context of the award, or from the nature of and circumstances attendant on the thing awarded, or by a manifest reference to something connected with it, the objection shall not prevail. Where there is no date to the award, it shall be taken as from the day of delivery, which may be ascertained by averment, and all other uncertainties may be helped by proper averments in pleading.

As an award must be certain, so, in order to prevent any future litigation on the subject of the submission, it must also be final.

On this principle, an award that each party shall be nonsuited in the action which he has brought against the other, is not good, because (amongst other reasons) a nonsuit does not bar them from bringing a new action; but an award that a party shall discontinue his action, or enter a *retraxit*, is good.

An award, "that all suits shall cease," or "that a bill in chancery shall be dismissed," or "that a party shall not commence or prosecute a suit," is final; for it shall be taken to mean, that the debt and action shall cease for ever.

Lastly, the award must be mutual, not giving an advantage to one party without an equivalent to the other.

The principal requisite, however, to form that mutuality, about which so much is said in all the cases usually classed under this rule, is nothing more than that the thing awarded to be done should be a final discharge and satisfaction of all debts and claims by the party in whose favour the award is made, against the other, for the matters submitted; and therefore the present rule amounts to nothing more than a different form of expression of that which requires that an award should be final.

The rules that at present govern the construction of awards are, that they shall be interpreted as deeds, according to the intention of the arbitrators; that they shall not be taken strictly, but literally, according to the intent of the parties submitting, and according to the power given to the arbitrators; that all actions mentioned in the award shall be construed to mean all actions over which the arbitrators have power by the submission; that if there be any contradiction in the words of an award, so that the one point cannot stand consistently with the other, the first part

shall stand, and the latter be rejected; but that if the latter be only an explanation of the former, both parts shall stand; and that where the words of an award have any ambiguity in them, they are always to be construed in such a manner as to give effect to the award.

Much unnecessary difficulty occurs in all the old reports, on the construction that ought to be put on the award of a release; but it is now clearly settled, that an award of releases up to the time of making the award is not altogether void, but that it shall be construed so as to support the award; and that for two reasons:— 1st. That it shall be presumed that no difference has arisen since the time of the submission, unless it be specially shewn that there has. 2d. That a release to the time of the submission is a good performance of an award ordering a release to the time of the award; not because the meaning of the arbitrators is so, but because their meaning must be controuled so far as it is void by construction of law.

Formerly, if one part of an award was void, the whole was considered so: now, however, it is the rule of the courts in many cases to enforce the performance of that which, had it stood by itself, would have been good, notwithstanding another part might have been bad; but if that part of the award which is void be so connected with the rest as to affect the justice of the case between the parties, the award is void for the whole.

When, from the tenor of the award, it appears that the arbitrator intended that his award should be mutual, according something in favour of one of the parties as an equivalent for what he has awarded in favour of the other; if then, that which is awarded on one side be void, so that the performance of it cannot be enforced, the award is void for the whole, because that mutuality which the arbitrator intended cannot be preserved.

If one entire act awarded to be done on one side comprehend several things, for some of which it would be good, and for others bad, the award is bad for the whole, because the act cannot be avoided.

When it appears clearly that both parties have the full effect of what was intended them by the arbitrator, though something he awarded which was void, yet the award shall stand for the rest.

An award ought regularly to be made in writing, signed and sealed by the arbitrators, and the execution properly witnessed; it may, however, be made by parole, if it be so expressly provided in the submission.

It is not in all cases absolutely necessary that performance should be exactly according to the words of the award; if it be substantively and effectually the same, it is sufficient. And if the party in whose favour the award is made accept of a performance different in circumstances from the exact letter of the award, that is sufficient; for *consensus tollit errorem*.

Where the concurrence and presence of both parties is not

absolutely necessary to the performance, each ought to perform his part without request of the other.

A considerable number of years having elapsed since the making of the award, is no objection to the parties being called upon to perform it; nor can the Statute of Limitations, 21 Jac. I. c. 16. § 3. be pleaded in bar.

An award in writing, and under seal, need not have a deed stamp, unless delivered as a deed; but, being only delivered as an award, it is sufficient if it have the award stamp.

CHAPTER XVIII.

Of Liens.

LIENS are of two kinds, particular and general; a *particular* lien is a right to retain the property of another on account of labour employed, or money expended, on that property; a *general* lien is a right to retain the property of another on account of a general balance due from the owner of such property.

Having premised the nature and distinction of liens, we shall proceed to inquire—1st. To whom the right of lien belongs; 2dly. How it may be acquired; and, 3dly. How it may be lost.

To whom the Right of Lien belongs.—As the common law has imposed an obligation on all persons exercising particular trades and occupations (*viz.* carriers, innkeepers, and farriers), which are conducive to the convenience of the community, to accept all employment offered, provided it be within the scope and comprehension of their business, and their means of accomplishing it; so, in recompence for the obligation it thus imposes, it entitles the party to a particular lien on the property, as a remuneration for the trouble and expence incurred in the execution of the purpose for which such property was entrusted.

But, notwithstanding it seems a common-law right, founded on policy, and admitted for the interest of trade, that all tradesmen have a lien upon goods for the labour and expence they have bestowed upon them in the execution of the purposes for which they were entrusted to them, yet it is an indubitable maxim of law, that if they once voluntarily part with the possession of such goods, they lose their lien upon them.

For the clearer understanding of this point, we shall distinctly state each particular trade to which the law has determined the right of lien to belong. But though this right has been decided to be the peculiar privilege of certain trades, yet it is necessary to premise that there is no express decision, that the right of lien is not the common right of all trades.

Indeed, from the various dicta and observations of the judges, it appears, that the remedy by retainer is not confined to those trades which are under an obligation to accept employment from all who offer it, but extends to every particular trade exercised for the benefit and advantage of the community.

Of Attorneys and Solicitors.—All attorneys and solicitors of the courts of law and equity have a general lien for their bill of costs upon all papers in their possession belonging to their clients.

But attorneys cannot detain papers belonging to third parties for their bill of costs against their clients.

So, the taking of a security for the payment of his costs, or a special agreement to deliver up papers in trust, will defeat his right of a general lien.

Of Bankers.—Bankers have a general lien upon all securities put into their possession in the way of their trade, provided they have not been delivered under circumstances which prove the contrary.

Of Captains and Masters of Vessels.—These have no lien on the ship or cargo for wages, or even for repairs or necessities done at their expence.

Of Calico Printers.—These have a general lien on all goods entrusted to them in the way of their business.

Of Carriers.—Carriers, either by land or water, have a general lien upon all goods delivered to them for the carriage price of the particular goods.

Of Coach Makers.—Coach-makers have a particular lien upon goods entrusted to them in the course of their trade.

Of Dyers.—Dyers have a particular lien upon goods delivered to them; and they may also have, by express agreement, or by the general resolution of their trade, a lien for a general balance due to them.

Of Factors, Brokers, and Agents.—It is a settled rule of law, that factors and agents, whether home or foreign, have a lien upon all property of their principal in their possession, or the proceeds thereof, even in the hands of the purchasers, as well for the charges incident to that particular property, as for the general balance of their accounts; and this not only on the particular goods for which the charges are incurred, but on all goods belonging to their principal in their possession, without regard to the time when, or to the account on which they received them.

Of Fullers.—By the particular custom of places, fullers have a general lien upon all goods entrusted to them in the course of their trade.

Of Innkeepers.—Innkeepers have a particular lien upon the goods of their guests, as also upon their persons, for their food or lodging, and upon their horses for their keep and stabling.

Of Insurance Brokers.—Insurance-brokers have a lien for the general balance of their accounts, on the policies effected by them

for their principals, as well as on the money received thereon; and they are entitled to this right, although the loss be not adjusted until after the bankruptcy of their principal.

Of Millers.—Millers have a particular lien upon goods entrusted to them for the purposes of their trade.

Of Packers.—Packers have a lien for a general balance due to them.

Of Pawnees.—Where a person pawns or deposits goods with another for a debt, or as a security for money advanced, the pawnee is entitled to retain them until the debt is discharged, or the money advanced is paid.

And this lien of pawnees has been held to attach upon the subject of the pawn or deposit for loans made to the pawner subsequent to the deposit of the pledge; provided it appears from the nature of the circumstances, that the pawnee made such subsequent loans on the credit of the pledge in his custody.

Of Vendors.—All sellers of property have a particular lien upon the goods while they remain in their custody, and the purchaser has not paid the price of them; unless credit was agreed for by the terms of agreement, and then the vendor's lien ceases from the time of making the purchase.

Of Wharfingers.—Wharfingers have a lien for the general balance of their accounts on all goods entrusted to them in the course of their trade.

But unless the goods are absolutely reduced into their custody, they have no right of retainer over them. And therefore, where a vessel was attached to a wharf, but the goods not landed, it was held that the wharfinger had no right to detain the goods.

How the Right of Lien may be acquired.—The right of lien may be acquired either generally or particularly: *generally*, for all legal claims which the party entitled to the lien has against the party against whom the right is claimed, for all work done, or expence incurred in the course of the same trade or transaction as that to which the lien relates; *particularly*, for the trouble or expence incurred in the execution of the purposes for which the lien was delivered to the party exercising the right.

The cases in which the right of lien may be exercised may be said generally to be—

1st. Where the thing on which the right of lien is claimed comes into the possession of the party exercising the right, by finding it at sea.

2dly. Where it is taken possession of under some legal right.

3dly. By express agreement.

4thly. By the acts of servants or agents acting within the scope of their employment.

5thly. By the general usage of trade.

6thly. By the particular usage of the parties.

How the Right of Lien may be lost.—It is a general rule of law, that no lien can be acquired upon property of which the party

claiming the lien has obtained the possession wrongfully, or by misrepresentation; or where it has been specially agreed that credit should be given solely to the personal credit of the owner of the lien; or by the delivery of a servant, an agent, or any person, without the authority and directions of the owner of the property. Nor can a lien be acquired upon property delivered by a trader who has committed an act of bankruptcy, or who has, in contemplation of his insolvency, assigned such property to a creditor, unless given without fraud or collusion previous to the commission of the act.

CHAPTER XIX.

Of Benefit Societies.

By the 33 Geo. III. c. 54. any number of persons may form themselves and establish one or more society or societies of good fellowship, for raising, by subscription of the members thereof, or by voluntary contribution, a fund for the mutual relief or maintenance of their members in old age, sickness, and infirmity, or for the relief of the widows and children of deceased members. And such members, or such number of them as shall be appointed a committee for that purpose, may assemble together, and make such rules, orders, and regulations for the government of the same, as to a majority of such society, or committee thereof so assembled, shall seem meet, so as the same be not contrary to law, nor to this act. And they may impose such reasonable fines and forfeitures upon the members who shall offend against such rules, orders, and regulations, as shall be just and necessary for duly enforcing the same, to be paid for the use of such society, as they shall by such rules, orders, or regulations direct; and they may alter and amend such rules, orders, and regulations, as occasion shall require, or repeal the same, and make new ones in lieu thereof. § 1.

Provided, that all such rules, orders, and regulations shall, with all convenient speed after the same shall be made, altered, or amended, and also after making, altering, or amending thereof, be exhibited in writing to the justices at the sessions, or adjournment thereof for the county or place where such society shall be established; and such rules, orders, and regulations shall be subject to the review of such justices, who may, after due examination at the then or the next subsequent sessions, annul and make void all such rules, orders, and regulations as shall be repugnant to this act, and shall allow and confirm such as shall be conformable thereto; and, after having been so confirmed, shall be signed

by the clerk of the peace at such sessions, and a duplicate thereof on parchment shall be deposited with and filed by the clerk of the peace at such sessions without fee, and the same shall be binding upon all parties. § 2.

(And such society which shall have exhibited the rules, &c. made for government thereof, at any general or quarter sessions having peculiar jurisdiction for the place where such society is established, and not to the sessions for the county, &c. at large, may exhibit the rules, &c. of such society at the general quarter sessions, or at any adjournment thereof, to be holden for the county, &c. where such society is established; such rules, &c. bearing the certificate of the town clerk or other proper officer of the time when such rules, &c. were respectively first exhibited as aforesaid: or they may exhibit in like manner a duplicate of a true copy of such rules, &c. with an affidavit annexed, to be taken before any justice of the county where such society is established, of the time when such rules, &c. were first exhibited, subject to the like examination, review, allowance, and confirmation of such last-mentioned general quarter sessions, or adjournment thereof, as directed by 33 Geo. III. c. 54. § 2; and such rules, &c. being confirmed by such last-mentioned general quarter sessions, or any adjournment thereof, in the manner directed by the said recited act, may be filed at such sessions, and shall be as valid and effectual from the time the same were first exhibited at the sessions having such peculiar jurisdiction as aforesaid, as if the same had been originally exhibited and filed at the sessions held for the said county, riding, division, or shire. 43 Geo. III. c. 111.)

Provided, that no rule, order, or regulation, confirmed in manner aforesaid, shall be altered, rescinded, or repealed, unless at a general meeting of the members of such society, convened by public notice in writing, signed by the secretary or clerk, in pursuance of a requisition by three or four members, and publicly read at the two usual meetings of such society held next before such general meeting for that purpose; unless a committee of such members shall have been nominated for that purpose; in which case such committee shall be convened in like manner; and that such alteration or repeal shall not be binding, unless made with the approbation of three-fourths of the members or committee then present, and agreed to and confirmed by the justices of such sessions or adjournment as aforesaid. § 3.

Such societies may, at a general meeting, or by their committee, appoint such officers as shall be necessary for carrying into execution the purposes of such institution, and may require of them security for the faithful discharge of their offices. But no bond or other security given in pursuance of this act shall be chargeable with stamp duty. § 4.

Every such society may elect any number of the members thereof (but not less than eleven) to be a committee, whose acts shall have as much force as if done at a general meeting: the powers of standing committees to be declared in the rules of the

society, and filed at the sessions aforesaid, and of particular ones (five of the members of which will at least be necessary to concur in any act of such committee) to be entered in a book by the secretary or clerk. § 5.

Committees are controulable by the society; and treasurers or trustees may, with the consent of such society, lay out the surplus of such contributions as the exigencies of the society do not call for, either upon private security, or may vest the same in the public funds, in either case in the name of such treasurer or trustee; and, with the consent of the society, may alter and transfer such securities and funds, and make sale thereof respectively, bringing the proceeds, dividends, and interest thereof, to account for the use of the society. § 6, 7.

Treasurers are to render accounts, and to pay over the balances remaining in their hands; and, in default thereof, the society may exhibit a petition in chancery, without paying any fees or stamp duties. § 8, 9.

If any person appointed to any office by any such society, and having in his hands any money, effects, or securities belonging to the same, shall die, or become bankrupt or insolvent, his creditors, administrators, or assigns shall, within forty days after demand made by the order of the society, or the major part of them assembled at any meeting, deliver all things belonging to such society to such person as they shall appoint, and shall pay out of the assets or effects all money remaining due, before any of his other debts. § 10.

All the effects belonging to such societies shall be vested in the treasurer or trustee for the time being, for the benefit of the society; and, after his death or removal, shall, without any transfer or assignment whatever, vest in his successor, who may bring and defend actions, which shall not be discontinued by the death or removal of such persons. § 11.

Before any of the rules, &c. of such societies shall be allowed, it shall be declared by one or more of the general rules, &c. of such society, for what intent and purpose it is intended to be established; and it shall be therein specified to what uses and purposes the money which shall be subscribed, paid, or given, for the benefit thereof, &c. shall be applied, and under what circumstances any member or other person shall become entitled to the same, or any part thereof. § 12.

And by the same section it is provided, that it shall not be lawful for any such society to dissolve or determine the same, or direct the division or distribution of such stock, or any part thereof, so long as the intents and purposes declared by them remain to be carried into effect, without the consent of five-sixths of the then existing members, and also of all persons then receiving or entitled to receive relief, testified under their hands.

All rules, orders, &c. to be entered in a book, and signed by the members, who may at all reasonable times inspect the same; and are to be received in evidence in all courts. § 13.

Societies may receive donations, which shall be applied in like manner as the contributions of the several members. § 14.

Members thinking themselves aggrieved may, on oath, complain to two justices, who may hear and determine the same without appeal. § 15.

Where general rules direct disputes to be settled by arbitration, whatever award, order, or determination, such arbitrators, or the major part of them, make, according to the true purport and meaning of the rules of such society, shall be binding and conclusive without appeal. § 16.

By the 49 Geo. III. c. 125. § 1. if any person, having been admitted a member of any society established under the authority of the 33 Geo. III. c. 54. shall offend against any of the rules, orders, and regulations of such society, it shall be lawful for any two justices, upon complaint made, on oath, by any member, to summon such person against whom such complaint shall be made; and upon his appearance, or, in default thereof, upon due proof upon oath of the service of such summons, such justices shall proceed to hear and determine the said complaint according to the rules, &c. of the said society, confirmed as directed by the said act, and shall make such order thereon as to them shall seem just. And in case the said justices shall adjudge any sum of money to be paid by such person against whom such complaint shall be made, and such person shall not, on notice of such order, forthwith pay the sum of money so adjudged to the person or persons, and in the manner directed by this act, such justices shall, by warrant under their hands and seals, cause the same to be levied by distress and sale of the goods of such person on whom such order shall have been made, together with such costs as shall be awarded by the said justices, and also the costs and charges attending such distress and sale.

And if complaint shall be made to two such justices of the peace, by any member of such societies, of relief having been refused to him by any such society, to which he shall be lawfully entitled according to the rules of the society to which he shall belong, it shall be lawful for the said two justices of the peace residing within the county, riding, division, shire, stewartry, city, liberty, or place within which such society shall be held, and such justices are hereby required, upon complaint made by or on the behalf of the person aggrieved thereby, to summon the person, being an officer of the society against whom such complaint shall be made, and upon his or her appearance, or in default thereof, upon due proof upon oath of the service of such summons, such justices shall proceed to hear and determine the said complaint, and award such sum of money to be forthwith paid to the said complainant as shall appear to such justices to be due on such award as aforesaid, together with such a sum for costs, not exceeding the sum of 10s. as to such justices shall seem meet; and if the said sums so to be awarded, together with such costs, shall not be forthwith and in the presence of such justice or justices paid to such complainant, or to some

person or persons there attending on the behalf of such complainant, then such justices shall by warrant under their hands and seals cause such sum and costs as aforesaid to be levied by distress or by distress and sale of the monies, goods, chattels, securities, and effects belonging to the said society, together with all further costs and charges attending such distress, or such distress and sale, returning the overplus (if any) to the said society, or to one of the treasurers or trustees thereof; and in default of such distress being found, then to be levied by distress and sale of the proper goods of the officer or officers of the said society so neglecting or refusing as aforesaid, together with such further costs and charges as aforesaid, returning the overplus (if any) to the owner; and so from time to time as often as complaint shall be made of the nonpayment of any sum or sums directed by such order to be paid as aforesaid, such justices shall by like warrant cause such arrears from time to time to be levied in the manner before directed: provided always, that whatever sums shall be paid by any such officer or officers, or levied on his or their proper goods, in pursuance of the order of any justices as aforesaid, shall be repaid, with all damages accruing to him or them by and out of the monies belonging to such society, or out of the first monies which shall thereafter be received by such society. § 3.

And all orders made by justices of the peace by virtue of the said act or this act, upon the complaint of any person having been admitted a member of any society established under the said act, who shall be aggrieved by any act, matter, or thing done or omitted to be done by any such society, shall be made upon the presidents, wardens, stewards, treasurers, trustees, or other principal officers of the society to which such complaint shall relate, or any one or more of them, or any of them, at the discretion of the said justices, in the proper name or names of such officer or officers; and every such order may be served upon the officer or officers so named therein, either by delivering a copy of the said order to such officer or officers, or one of them, or leaving the same at his last or usual place of abode; and such service shall be binding on such officer or officers, and on the society to which such officer or officers shall belong, to do and perform, or cause to be done and performed, all and every the matters and things contained in and directed by such order to be done, according to the true intent and meaning thereof. § 4.

And every order, adjudication, or award of any justice or justices under this act, shall be final and conclusive to all intents and purposes, and shall not be removed or removable into any court of law, or restrained or restrainable by the injunction of any court of equity. § 5.

By 59 Geo. III. c. 128. no society hereafter to be formed in England or Wales, or the members thereof, shall be entitled to the benefits, or subject to the provisions of the acts of 33 Geo. III. c. 54. 35 Geo. III. c. 111. 43 Geo. III. c. 111. and 49 Geo. III. c. 125.

unless such society shall have been constituted under the authority and according to the provisions of this act. § 1.

When any number of persons in England or Wales shall intend to form a friendly society, it shall be lawful for such persons to make application by memorial to the justices at the general quarter sessions of the peace, or any adjournment thereof, in and for the county, riding, or place of separate jurisdiction, wherein such society is about to be established, for a confirmation and approval of the rules of such intended institution, and of the tables of payments and allowances to be adopted therein; and if such justices, or any committee by them appointed consisting of not less than three justices (of whom two shall be a quorum), shall, after due examination thereof, be satisfied that the contingencies for which it is intended to provide, whether specifically named in this act or not, are such as, according to the true meaning and intent of this act, are fit to be provided for by such society, and shall deem the rules and tables of such society, either in the form in which they shall have been originally exhibited, or with such omissions, additions, or alterations as may be made therein by the said justices, with the consent of the persons proposing to be trustees of such society, to be fit and proper, and shall be satisfied that the formation of such society will be useful and beneficial, regard being had to the existence of any other society already formed under wholesome rules within the same district for the like purposes; the said rules and tables so confirmed or amended shall be deposited and enrolled according to the provisions of the said first-mentioned act, and a copy thereof, authenticated by the signature of two or more justices, shall be delivered to the trustees of such society, and shall thenceforward become the rules of such society, and shall be binding on all parties concerned: provided always, that such justices shall not confirm and allow any tables of payments or benefits, or any rules dependent upon or connected with the calculation thereof, until it shall have been made appear to such justices that the said tables and rules are such as have been approved by two persons at the least, known to be professional actuaries or persons skilled in calculation, as fit and proper, according to the most correct calculation of which the nature of the case will admit. § 2.

And the justices at the general quarter sessions of the peace from time to time may make and publish such general rules for the formation and government of friendly societies or institutions under the authority of this act as to such justices may appear fit, and may require that the rules of all societies thereafter established within such county or riding shall be made conformable to such general rules; and it shall also be lawful for such justices to declare, that the rules proposed for the formation of such friendly societies or institutions, which shall be made conformable to such general rules, may be exhibited to and confirmed by any two or more justices holding petty sessions within the division wherein any such society is to be established; and in such case, and subject

always to the direction of such general rules published as aforesaid, such justices in petty sessions shall have the like powers, and their proceedings shall be subject to the like provisions, in regard to the formation of friendly societies, as are by this and the former acts established in respect of the justices assembled in general or quarter sessions. § 3.

And every memorial presented to the justices as aforesaid shall set forth the names, residence, and occupation of three persons at the least, of whom the majority shall be substantial householders assessed to the relief of the poor upon a sum not less than fifty pounds, which persons shall be trustees of such society or institution; and the signature of such intended trustees shall be affixed to such memorial. And such society shall from time to time, in such manner as may have been prescribed by the rules thereof, elect other persons duly qualified as aforesaid to fill such vacancies as may occur among such trustees; and in case such vacancy shall continue for more than three months, so as to reduce the number of trustees below the number of three, it shall be lawful for the remaining trustees to nominate one other fit person to be the third trustee: provided, that no trustee shall be removed from his office without his own consent, except with the approbation of two or more justices in petty sessions. § 4.

And as often as the trustees and persons having under the rules of any such society the management thereof shall be desirous of making any alteration in or addition to the rules and tables, it shall be lawful for them to make further application to the justices in general or petty sessions, the memorial being signed by the trustees or the major part thereof, and such application shall be dealt with by the said justices according to the provisions hereinbefore contained with respect to the allowance or alteration of the rules and tables proposed at the first establishment of such society in as far as the same are applicable thereto. § 5.

And the trustees of each such society shall appoint one fit person or more to be treasurer or treasurers of such society, and shall require from such treasurer or treasurers such securities as the said trustees may from time to time deem necessary and proper; and no bond or other security to be given to or on account of any such society, or in pursuance of this act, shall be charged or chargeable with any stamp duty whatever. § 6.

And all moneys, goods, chattels, and effects whatever, and all securities for money, or other obligatory instruments and evidences or muniments, and all other effects whatever, and all rights or claims belonging to or had by such institution, shall be vested in the trustee or trustees of such institution for the time being, for the use and benefit of such institution and the respective depositors therein, their respective executors or administrators, according to their respective claims and interests; and, after the death or removal of any trustee or trustees, shall vest in the succeeding trustee or trustees for the same estate and interest as the former trustee or trustees had therein, and subject to the same trusts,

without any assignment or conveyance whatever, except the transfer of stocks and securities in the public funds of Great Britain; and also shall, for all purposes of action or suit, as well criminal as civil, in law or in equity, in anywise touching or concerning the same, be deemed and taken to be, and shall in every such proceeding (where necessary) be stated to be the property of the person or persons appointed to the office of trustee or trustees of such institution for the time being, in his, her, or their proper name or names, without further description; and such person or persons shall, and they are hereby respectively authorized to bring or defend, or cause to be brought or defended, any action, suit, or prosecution, criminal as well as civil, in law or equity, touching or concerning the property, right, or claim aforesaid, of or belonging to or had by such institution; and such person or persons so appointed shall and may, in all cases concerning the property, right, or claim aforesaid of such institution, sue and be sued, plead and be impleaded, in his, her, or their proper name or names, as trustee or trustees of such institution, without other description; and no such suit, action, or prosecution shall be discontinued or abate by the death of such person or persons, or his or their removal from the office of trustee or trustees, but the same shall and may be proceeded in by the succeeding trustee or trustees, in the proper name or names of the person or persons commencing the same, any law, usage, or custom to the contrary notwithstanding; and such succeeding trustee or trustees shall pay or receive like costs, as if the action or suit had been commenced in his or their name or names, for the benefit of or to be reimbursed from the funds of such institution. § 7.

And it shall not be lawful to dissolve any society or institution established under the authority of this act; nor shall any division of the funds thereof be made, otherwise than in the ordinary course of proceeding, according to the rules confirmed as aforesaid, without the consent of the trustees or the major part of them: provided always, that no such consent of trustees shall be given, unless and until it shall have been certified by two or more professional actuaries, or persons skilled in calculation as aforesaid, which persons shall have been approved as such by the justices as aforesaid, that, according to the most correct calculation of which the case will admit, the interest of all the contributors to such institution, and of all persons having claims thereon, in possession or expectancy, are, by the proposed scheme of dissolution or division, fairly dealt with and secured. § 8.

The rules of every society shall specify the place or places at which it is intended to hold its meetings, and the powers and duties of the members at large, and of such committees or officers as may be appointed for the management of its affairs, subject always to the provisions of this act with respect to the appointment and duties and powers of the trustees; and such society shall not be subject to the restrictions of the act of the 33 Geo. III.

as to the appointment of committees or otherwise, with respect to the management of such society. § 9.

Funds of benefit societies may be subscribed into savings banks ; or paid directly into the Bank of England to the account of the commissioners for the reduction of the national debt, upon debentures, subject to the same regulations as savings banks ; or the same may be vested in the public funds, or laid out upon real security at interest. § 10, 11, 12.

The trustees shall not be liable to make good any deficiency which may arise in the funds, unless they shall have respectively declared by writing under their hands, deposited and registered in like manner with the rules, that they are willing to be answerable ; and they may limit their responsibility to such sum as shall be specified in any such instrument in writing. § 13.

And when the trustees of any society shall be apprehensive that the funds of such society, together with the sum (if any) for which persons having formed the said society shall have made themselves responsible as aforesaid, are likely to prove insufficient to make all the payments becoming due to the several parties interested according to the rules of such society, the said trustees shall forthwith state their apprehension, and the grounds thereof, to the justices in general or quarter sessions, or if the rules of such institution shall have been originally confirmed at the petty sessions, then to the justices in such petty sessions ; and it shall be lawful for such justices, upon a full statement of the accounts and proceedings of such society, which the said trustees are hereby directed to furnish at the requisition of such committee, to make such order for the adjustment of the claims of all parties interested in the funds of such society as to them may appear fair and equitable ; provided always, that it shall be lawful for any person or persons, who may think themselves aggrieved by any such order of justices in petty sessions, to appeal therefrom to the justices assembled in the quarter sessions next ensuing after the date of such order, whose decision shall be final and conclusive. § 14.

And whereas by the 40 Geo. III. no sufficient provision is made for the relief of widows and children of deceased members of friendly societies, who may be aggrieved by the officers or members of the societies of which their husbands or parents were members ; be it further enacted, that the justices of the peace shall have the like power and jurisdiction in cases of complaint made by or on behalf of such widows and children, as they have under the said last-mentioned act or under this act, in regard to the members of such societies themselves. § 15.

And all the provisions of the 33 Geo. III. and 49 Geo. III. as to matters for which no other provision is made by this act, shall be deemed, so far as the same are not repugnant to this act, applicable to all societies and institutions formed under the authority of this act. § 16.

CHAPTER XXI.

Of Insolvent Debtors.

By the 1 Geo. IV. c. 119.* entitled, "An Act for the Relief of Insolvent Debtors in England;" his majesty is empowered to appoint a chief and two other commissioners, being barristers at law of ten years standing at the least, to be his majesty's commissioners for the relief of insolvent debtors, and to preside in a court to be called "The Court for Relief of Insolvent Debtors;" which shall be a court of record for the purposes of this act; and which court shall have power to appoint a chief clerk, a provisional assignee, a receiver, and such other officers as the lord chancellor, and the chief justices of the Courts of King's Bench and Common Pleas, and the lord chief baron of the Exchequer, shall judge to be necessary, and in such manner as they shall direct: and the said court, or any of the commissioners acting under the powers of this act, may adjourn any meeting under this act as often as the said court or commissioners shall think necessary, and may administer oaths, and examine all parties and witnesses upon oath, and shall have such, like, and the same powers of compelling the attendance of witnesses, and of requiring and compelling the production of books, papers, and writings, as now are possessed by any of the superior courts at Westminster, and to order any prisoner who shall have petitioned for relief, or any prisoner who shall be a necessary and material witness, to be brought before the said court as often as the said court shall think fit; and the said court shall also have the power of committing all persons guilty of any contempt, to the prisons of the King's Bench, or to the common gaol of any county in which such person shall be, and the power of fining in a summary way, or removing any of the officers of the said court who shall be guilty of any negligence, wilful or unnecessary delay, or other misconduct whatsoever. But the court cannot award costs, but in certain cases; and witnesses are not compelled to attend, unless their reasonable expences are previously tendered to them. § 1.

The sittings of the court are to be twice a week throughout the year. § 2.

And no fees are to be taken, except such as shall be established by the court. § 3.

Any person who shall be in actual custody upon any process whatsoever, for or by reason of any debt, damage, costs, sum or sums of money, or for or by reason of any contempt of any court whatsoever, for nonpayment of any sum or sums of money, or of costs, taxed or untaxed, either ordered to be paid, or to the payment of which such persons would be liable in purging such con-

* For the amendments to this act, the reader is referred to the 3 Geo. IV. c. 123. and the 5 Geo. IV. c. 61. in the Supplement.

tempt, or in any manner in consequence of or by reason of such contempt, at any time within the space of fourteen days next after the commencement of such actual custody, or within such further time as the court shall think reasonable, to apply by petition in a summary way to the court for his or her discharge from such confinement; and in such petition shall be stated the place wherein such prisoner shall be then confined, the time when such prisoner was first charged in custody, together with the name or names of the person or persons at whose suit or prosecution he or she shall, at the time of presenting such petition, be detained in custody, and the amount of the debts and sums of money, and also of such costs as aforesaid, so far as the amount of such costs is ascertained, for which such prisoner shall be so detained; and shall pray to be discharged from custody, and to have future liberty of his or her person against the demands for which such prisoner shall be then in custody, and against the demands of all other persons who shall be or claim to be creditors of such prisoner at the time of presenting such petition; which petition shall be subscribed by the said prisoner, and shall be forthwith filed in the said court. And such prisoner shall, at the time of subscribing such petition, duly execute a conveyance and assignment, in such manner and form as the said court shall direct, of all the estate, right, title, interest, and trust of such prisoner to all the real and personal estate and effects of every such prisoner (except to the wearing apparel, bedding, and other such necessities of such prisoner and his or her family, not exceeding in the whole the value of twenty pounds), so as to vest all such real and personal estate and effects in the provisional assignee of the said court, subject to a proviso that in case such prisoner shall not obtain his discharge by virtue of this act, such conveyance and assignment shall, from and after the dismissal of the petition of such prisoner praying for his discharge, be null and void to all intents and purposes. § 4.

The court may order an allowance for support of prisoners during confinement. § 5.

Every prisoner shall, within the space of fourteen days next after his petition shall have been filed, or within such further time as the court shall think reasonable, deliver into the court a schedule, containing a full and true description of all and every person and persons to whom such prisoner shall be then indebted, or who, to his or her knowledge or belief, shall claim to be his or her creditors, together with the nature and amount of such debts and claims respectively, distinguishing such as shall be admitted from such as shall be disputed by such prisoner, and also a full, true, and perfect account of all the estate and effects, real and personal, in possession, reversion, remainder, or expectancy, and also of all places of benefit or advantage, whether the emoluments of the same arises from fixed salaries or from fees; and also of all pensions or allowances of the said prisoner in possession or reversion, or held by any other person or persons for or on behalf of the said prisoner, or of and from which the said prisoner derives or may derive

any manner of benefit or advantage; and also all rights and powers of every nature and kind whatsoever, which such prisoner, or any other person or persons in trust for such prisoner, or for his or her use, benefit, or advantage, in any matter whatsoever, shall be seised or possessed of, or interested in, or entitled unto, or which such prisoner, or any person or persons in trust for him or her, or for his or her benefit, shall have any power to dispose of, charge, or exercise for the benefit or advantage of such prisoner, at the time of presenting such petition; together with a full, true, and perfect account of all debts at such time owing to such prisoner, or to any person or persons in trust for him or her, or for his or her benefit or advantage, either solely or jointly with any other person or persons; and the names and places of abode of the several persons from whom such debts shall be due or owing, and of the witnesses who can prove such debts, so far as such prisoner can set forth the same: and such schedule shall also fully and truly describe the wearing apparel and bedding of such prisoner, and his or her family, and the working tools and implements, and other such necessities, not exceeding in the whole the sum of twenty pounds, which may be excepted, together with the values of such excepted articles respectively: and the said schedule shall be subscribed by such prisoner, and shall forthwith be filed in the court. § 6.

When the court shall adjudge any prisoner to be entitled to his discharge, such court shall appoint a proper person or persons to be assignee or assignees of the estate and effects of such prisoner for the purposes of this act; and when such assignee or assignees shall have signified to the court their acceptance of the said appointment, every such prisoner's estate, effects, rights, and powers, vested in such provisional assignee as aforesaid, shall immediately be assigned by such provisional assignee to such assignee or assignees, in trust for the benefit of such assignee or assignees and the rest of the creditors of such prisoner, in respect of or in proportion to their respective debts, according to the provisions of this act. And in case any prisoner shall be entitled to any copyhold or customary estate, the assignment shall be entered on the court rolls of the manor; and thereupon it shall be lawful for the assignee or assignees to surrender or convey such copyhold or customary estate to any purchaser or purchasers, and the rents and profits shall be in the mean time received by such assignees for the benefit of the creditors, without prejudice nevertheless to the lord or lords of the manor. And such assignee or assignees are fully empowered to sue in their own names, for the recovery, obtaining, and enforcing any estate, effects, or rights of such prisoner; and also to execute any trust or power vested in or created for the use or benefit of such prisoner, but in trust for the benefit of the creditors, and to give such discharges as may be requisite. And every such assignment shall be entered on the proceedings of the court, and an office copy shall be sufficient evidence thereof in all courts, and to all intents and purposes. And every such assignee or assignees shall, with all convenient speed, after accepting such assignment, use their best

endeavours to receive and get in the estate and effects of such prisoner, and shall, with all convenient speed, make sale of all the estate and effects of such prisoner. And if such prisoner shall be interested in, or entitled to any real estate, either in possession, reversion, or expectancy, the same within the space of two months after such assignment and conveyance, or within such other time as the court shall direct, shall be sold by public auction, in such manner and place as the major part of the creditors (who shall assemble together on any notice published in the London Gazette, and in some daily paper published in London or within the bills of mortality, if the prisoner before going to prison resided in London or within the bills of mortality; and if such prisoner resided elsewhere, then in some printed newspaper published and generally circulated in or near the county, riding, division, city, town, liberty, or place in which he resided before he was committed to prison; thirty days before such sale shall be made) shall, under their hands, approve. And such assignee or assignees, at the end of three months at the farthest, and so from time to time as occasion shall require, shall make up an account of such prisoner's estate, and make oath in writing, before an officer of the court, or one or more justice or justices of peace of the county, riding, division, city, town, liberty, or place in which such assignee or assignees shall reside, that such account contains a fair and just account of the estate and effects of every such prisoner got in by or for such assignee or assignees, and of all payments made in respect thereof; and that all payments in every such account charged were truly and *bonâ fide* made and paid; which account so sworn shall be filed with the proper officer of the court: and if it shall appear that such assignee or assignees have in their hands any balance wherewith a dividend may be made, they shall forthwith declare the amount of the balance; and notice of the making of every such dividend shall be published, in like manner as a meeting of creditors is directed to be published, thirty days at least before such dividend shall be made; and every creditor whose debts shall be stated *admitted* in the prisoner's schedule shall be allowed to receive a share of such dividend, unless such prisoner, the assignees, or any other creditor, shall object to any such debt, in which case the court shall have power to decide upon it. § 7.

Where prisoners discharged may be entitled to annuities for their own lives, or other uncertain interests, or to reversionary or contingent interests, or to property under such circumstances that the immediate sale thereof may be very prejudicial to them, it shall be lawful for the court to take into consideration all the circumstances affecting such property, either at the time of the prisoner's discharge, or at any subsequent time; and if it shall appear reasonable to make any special order touching the same, it may direct in what manner such property shall be managed for the benefit of the creditors until the same can be properly sold, or until payment of all such creditors, and make such order touching the sale or disposition of such property as to the court shall seem reasonable. And if it shall appear to the court that the debts of such prisoner can be discharged by means of money raised by way of mortgage,

instead of raising the same by sale, it shall be lawful for the court to give all necessary directions for such purpose. § 8.

In case any prisoner or any of his creditors shall be dissatisfied with the conduct of the assignees, or if they neglect to do their duty in any respect, the court may direct inquiry into their conduct, and in case of malversation award costs against them. § 9.

Annuity creditors are entitled to receive a dividend or dividends of the estate of such prisoners, in such manner and upon such terms and conditions as such creditor or creditors would have been entitled unto by the laws now in force if the prisoner had become bankrupt; the amount upon which such dividend shall be calculated, and the terms and conditions on which the same shall be received, being first settled by the court; and without prejudice in future to their respective securities, otherwise than as the same would have been affected by a proof made in respect thereof by a creditor under a commission of bankrupt, and a certificate obtained by the bankrupt under such commission. § 10.

No suit at law for the benefit of the prisoner's estate can be commenced by the assignees without the consent of the majority of the creditors in value. § 11.

Where persons claiming the benefit of the act are seised of lands, and have power to lease, the like power is extended to the assignees. § 12.

The assignees, with the consent of the major part of the creditors in value, and of one of the commissioners of the court, may compound for any debt due to the prisoner, where it may appear necessary, and for the benefit of his estate. § 13.

In case any assignee or assignees shall be unwilling to act, or should die, &c. the court may appoint fresh assignees. § 14.

In case any assignee, or the heirs, executors, or administrators of any deceased assignee, shall not deliver over any part of the estate or effects, or pay the balance of the produce thereof in his or their hands, it shall be lawful for the court to order the person or persons so offending to be arrested and committed to the county gaol, there to remain, without bail or mainprize, until they shall have fulfilled their duty, or until the court shall make other order to the contrary. § 15.

After the petition and schedule of the prisoner shall have been respectively filed in the court, notice thereof is to be given to the creditor or creditors at whose suit such prisoner shall be detained, or the attorney or agent of such creditor or creditors, and to the other creditors named in the schedule of such prisoner, or such of them as the said court shall think fit, and to be inserted in the London Gazette, and also, if the court shall think necessary, in some other newspaper or newspapers; and a day and place for the hearing of the matter of such petition shall be appointed. And in case such notice as the court shall direct shall have been given by any creditor, of his or her intention to oppose the prisoner's discharge, it shall and may be lawful both for the said creditor, and any other of the creditors of the said prisoner, to oppose such prisoner's discharge, and for that purpose to put such questions and

examine such witnesses as the court shall think fit, touching the matters contained in such petition and schedule; but no creditor shall examine or oppose the discharge of such prisoner, until he shall make oath or affidavit of his debt, or otherwise satisfy the court of his right to oppose such prisoner's discharge. And, at such hearing, any creditor or creditors so opposing may require, or the court may, if it shall deem necessary, order, that it shall be referred to an officer of the court to investigate the accounts of the said prisoner, and to examine into the truth of his schedule, and to report thereon to the court. And in case such prisoner shall not be opposed, and the court shall be satisfied with the said schedule, and that such prisoner is entitled to the benefit of the act, then the court shall order the prisoner to be discharged from custody forthwith, or so soon as such prisoner shall have been in custody at the suit of one or more of the persons who were creditors at the time of petitioning, or who have since become creditors in respect of debts then growing due, for such period or periods not exceeding six months in the whole, to be computed from the time of filing the petition of such prisoner; and such discharge shall extend to all process issuing from any court for any contempt of any court, ecclesiastical or civil, by nonpayment of money, or of costs or expences in any cause or proceeding in any court, ecclesiastical or civil. And in case it shall appear to the court, that the opposition to the petition of such prisoner by any of his creditors is frivolous and vexatious, then it shall be lawful for the said court to award such costs as shall appear to be just and reasonable. § 16.

When it shall appear to the court that the prisoner has destroyed his books, or otherwise acted in a fraudulent manner towards his creditors, it may order him to be imprisoned for any term not exceeding three years. § 17.

Or when prisoners shall have contracted debts fraudulently, &c. or put their creditors to any unnecessary expence, the court may extend the time of imprisonment to two years. § 18.

And in all cases where such prisoner shall not be ordered to be discharged forthwith, but to be liable to imprisonment at the suit of his creditor or creditors, or of any or either of them, it shall be lawful for the court, on the application of such prisoner, to order the creditor or creditors at whose suit such prisoner shall be imprisoned, to pay to such prisoner such sum or sums of money, not exceeding the rate of four shillings by the week in the whole, at such times and in such manner as the court shall direct; and that, on failure of payment thereof as directed by the court, such prisoner shall be forthwith discharged from custody at the suit of the creditor or creditors so failing to pay the same. § 19.

Justices of the peace at the general quarter sessions, or general sessions of the peace, shall and may in open court appoint as many fit persons as they shall judge sufficient, to be examiners within their respective jurisdiction. § 20.

The court may direct final examinations to be taken at quarter sessions; notice thereof to be given in the *London Gazette* or other papers. And in case any one creditor shall give two days notice to

such prisoner of his intention to oppose such prisoner's discharge, then it shall be lawful for such creditor, or any other creditor, to oppose such prisoner's discharge, and to put to such prisoner all such questions as to such justices shall appear relevant and proper, and such prisoner shall answer upon oath all such questions. And if it shall appear to such justices to be expedient and proper that the accounts of such prisoner, and the matters of his schedule, should be further investigated and examined, then it shall be lawful for them to adjourn the hearing of the petition of such prisoner to some subsequent general or quarter or adjourned sessions, and at the request of any one or more creditors to order and direct that some one of the examiners appointed by the said justices shall examine into the matters of the said schedule, and certify his opinion thereon to the said justices at such general or quarter or adjourned sessions; and such examiner shall receive for his trouble the sum of one pound and no more for every meeting under such order, to be paid by the person or persons requiring the same. And in case it shall appear that such prisoner is entitled to the benefit of the act, then the said justices shall so declare and adjudge, and shall certify the same to the court. And in case it shall appear to the said justices by such examination, or by evidence, that such prisoner shall have contracted any debts, against which he shall seek to be discharged, fraudulently, or without any reasonable or probable expectation, at the time of contracting, of being able to pay the same, or shall, with intent to conceal the state of his affairs, or to defeat the objects of this act, have destroyed or otherwise wilfully prevented the production of any books, papers, or writings, or shall have kept, or cause to be kept, false books, or made false entries, or have wilfully and fraudulently altered or falsified any such books, papers, or writings, or shall in any respect have been guilty of fraud, in contracting, discharging, or concealing any debt due from the said prisoner to any of his or her creditors, or shall have fraudulently made away with, charged, mortgaged, or concealed any part of his or her property, of what kind soever, either before or after the commencement of his or her said imprisonment, or of giving an undue preference to any of the said creditors, or that such prisoner shall have put any of such creditors as shall have proved their debts to unnecessary expence, by any vexatious or frivolous defence, or improper delay in any suit for recovering the same, or that such prisoner shall have wilfully or fraudulently omitted any effects or property whatsoever, to the value of not less than twenty pounds in the whole, in the schedule which the said prisoner shall first have delivered into the court; then such justices shall so declare and adjudge, and shall also declare and adjudge, in like manner, and subject to the same limitations as are herein-before mentioned and imposed in such cases upon the court itself, for what period of time such prisoner shall remain in actual custody before such prisoner shall be discharged from custody. § 21.

After the prisoner's committal, if he should be removed by writ of *habeas corpus*, affidavits of creditors may be received in opposition to his discharge, except in Surrey, Middlesex, or the city of London. § 22.

The order of court for the discharge of prisoner is to be final, unless obtained upon false evidence, &c. in which cases the prisoner may be remanded, and afterwards brought up for re-examination. § 23.

In case of false swearing, the prisoner is subject to the punishment inflicted for perjury. § 24.

When any order for the discharge of any prisoner shall be made, the court may also order that a judgment shall be entered up against such prisoner in some one of the superior courts of Westminster, in the name of the assignee or assignees, or of such provisional assignee as aforesaid, for the amount of the debts of such prisoner which shall at the time remain due and unpaid, and from which such prisoner shall be discharged by such order; and the said prisoner shall execute a warrant of attorney to authorize the entering up such judgment; and such judgment shall have the force of a recognizance; and such order of the court shall be a sufficient authority to the proper officer for entering up such judgment; and when it shall appear to the satisfaction of the court that such prisoner is of ability to pay such debts, or any part thereof, or that he is dead, leaving assets for that purpose, the court may permit execution to be taken out upon such judgment, or put in force any other power given by this act against the property acquired by such prisoner after his discharge, for such sum of money as under all the circumstances of such prisoner the court shall order; and such further proceeding shall and may be had, according to the discretion of the court, from time to time, until the whole of the debts due to the several persons against whom such discharge shall have been obtained shall be fully paid and satisfied, together with such costs as such court shall think fit to award; and no *scire facias* shall be necessary to revive such judgment on account of any lapse of time: provided always, that in case any such application against such prisoner shall appear to the court to be ill-founded and vexatious, it shall be lawful for the court, not only to refuse to make any order on such application, but also to dismiss the same with costs. § 25.

But no prisoner, after judgment is so entered up, is to be subject to imprisonment by reason of the same. § 26.

Where any prisoner shall be declared entitled to the benefit of the act, no execution shall issue against such prisoner for debt contracted prior to his actual confinement: but a prisoner may be proceeded against on that which could not be put in force at his discharge. § 28.

In case any prisoner shall, after his discharge, become entitled to any stock in the public funds, or to any bills of exchange, promissory notes, bank notes, or other choses in action, or other property which by law cannot be taken in execution under the said judgment, and such prisoner shall have refused to convey, assign, or transfer the same, or so much of them as may be sufficient to satisfy the said judgment, then the assignee or assignees may apply by petition, that the said prisoner may be remanded to custody (which shall in such cases always be within the walls of the prison

from whence such prisoner shall have been discharged) until he shall convey, assign, and transfer the same, or as much thereof as the court shall direct, towards the satisfaction of such judgment, to such assignee or assignees. § 29.

In case any person or persons, body politic or corporate, shall, after the discharge of any prisoner, become possessed of, or have under their power or controul, any stock in the public funds, or any legacy, money due or growing due, bills of exchange, promissory notes, bank notes, securities for money, goods, and chattels, or any other property whatsoever, belonging to such prisoner, or held in trust for him, or for his use and benefit, or to which such prisoner shall be in any way entitled; or in case any such persons shall be in any manner indebted to such prisoner, it shall and may be lawful for the court, upon the application of any assignee or creditor of such prisoner, to cause notice to be given to such persons, to hold and retain the said property till the court shall make further order concerning the same; and thereupon it shall be lawful for the court further to order such persons to deliver over such property, and to pay such debts as aforesaid, or any part thereof, to the receiver of the said court, or to the assignee or assignees of such prisoner, for the general benefit of his creditors entitled to claim under such judgment. § 30.

The court may appoint attorneys to practise in it. § 31.

Prisoners wilfully omitting any thing in their schedule as finally amended (except wearing apparel, &c. not exceeding 20*l*.) are subject to three years imprisonment. § 33.

No conveyance, assignment, letter of attorney, affidavit, or other proceedings whatsoever, before or under any order of the court, or before any justices of the peace acting in the execution of the act, shall be liable to the payment of, or be chargeable with the payment of any stamp or other duty whatsoever. § 34.

Advertisements are not to be charged more than three shillings each, and are exempt from stamp duties. § 35.

Proceedings of commissioners, and their powers under the former act for the relief of insolvent debtors, are extended to this act. § 36.

And all the records, papers, documents, and money, of and belonging to or received under the authority of the court established by virtue of the said act, shall be delivered over to the chief clerk of the court; and which said records shall be deemed and taken to be the records of the court. § 37.

Assignees' power is not to extend to the effects of officers of the army or navy, &c. or beneficed clergymen; but sequestration of the profits of the benefice may be applied for the benefit of creditors, and the portion of the pay of officers may be obtained by application to the proper authority. § 38.

Justices of Kesteven and Holland, in the county of Lincoln, may hold their quarter sessions for the purposes of this act in the division of Lindsey. § 39.

The provisions of this act shall not extend to crown debtors, unless three of the lords commissioners of the treasury shall give their consent thereto. § 40.

Prisoners under writ of *capias* in cases of extents, may apply to the barons of Exchequer to be discharged. § 41.

Uncertificated bankrupts are not entitled to a discharge under this act for debts which might have been proved under the commission, unless in custody for three years. § 42.

No person having had the benefit of an insolvent act shall be entitled to further relief within five years, unless three-fourths in number and value of the creditors consent thereto, or it shall be made appear to the satisfaction of the court, that such person has, since his or her former discharge, endeavoured, by industry and frugality, to pay all just demands, and has incurred no unnecessary expence, and that the debts which such person has incurred have been necessarily incurred for the maintenance of his or her family, or that the insolvency of such person has arisen from misfortune, or from inability to acquire subsistence for himself or herself, and his or her family. § 43.

By section 44, provision is made for the benefit of prisoners who may become insane during their confinement.

The officer of the court is to produce schedules and proceedings of the court, when required, to the prisoner or his creditors, which documents are to be admitted in all courts as legal evidence. § 45.

Prisoners may, after their discharge, be examined as to their estate and effects, on the application of assignees; and such persons refusing to appear, or to answer questions, &c. may be committed until they conform to the orders of the court. § 46.

Assignees may be examined within six months after their appointment; and dividends remaining in their hands for twelve months shall be immediately paid into court; and in default of payment, it shall be lawful for the court to make such summary remedy for the purpose, by a distress and sale of the goods and chattels of such assignee or assignees, as to them shall seem proper; and if no sufficient distress can be found, the court shall be at liberty to commit the offender to the common gaol or house of correction, without bail or mainprize, there to remain until the court shall make other order to the contrary. § 47.

Costs may be recovered from any person or persons in the same manner as costs awarded by a rule of any of the superior courts at Westminster may be recovered. § 48.

All petitions and other proceedings relating thereto, of all persons confined as aforesaid, and in the custody of the sheriffs of London and sheriff of Middlesex, and of the warden of the Fleet Prison, may, if the court shall think fit, be heard and determined at the Guildhall in and for the said city of London, or at the Sessions-House in the Old Bailey, or at such other place in the city of London as the said commissioners for the time being shall appoint for that purpose. § 49.

Persons discharged from contempts of court for nonpayment of costs to be relieved from other costs, &c. § 50.

This act not to defeat the proceedings in any commission of bankrupt. § 51.

APPENDIX.

FORMS OF LEASES AND ASSIGNMENTS.

Lease of a House.

THIS Indenture, made the _____ day of _____ in the _____ year of the reign of our Sovereign Lord George the Fourth, by the grace of God, of the United Kingdom of Great Britain and Ireland King, Defender of the Faith, &c. and in the year of our Lord _____ between A. A. of _____ of the one part, and H. H. of _____ of the other part, witnesseth, That, for and in consideration of the yearly rent, and of the covenants, provisoes, and agreements hereinafter reserved and contained, by and on the part and behalf of the said H. H. his executors, administrators, and assigns, to be paid, observed, and performed, he the said A. A. hath demised and leased, and by these presents doth demise and lease, unto the said H. H. his executors, administrators, and assigns, all that messuage or tenement and dwelling-house situate and being on the _____ side or part of _____ street, in the parish of _____ in the city of London, together with [*here describe the particulars of the premises*] and also all ways, passages, lights, easements, rooms, vaults, cellars, areas, yards, watercourses, profits, conveniences, hereditaments, and appurtenances whatsoever, to the said messuage or premises hereby demised belonging, or in any ways appertaining, or reputed or known to be part, parcel, or member thereof; all and singular which said messuage and premises are now or lately were in the occupation of G. G. his assignee or assigns; to have and to hold the said messuage or tenement and premises, with the appurtenances hereby demised, or so mentioned to be, unto the said H. H. his executors, administrators, and assigns, from the 25th day of December last past, for and during the term of twenty-one years thence next ensuing, and fully to be complete and ended; determinable, nevertheless, at the expiration of the first seven or fourteen years thereof, upon such conditions as are hereinafter mentioned: be the said H. H. his executors, administrators, and assigns, yielding and paying yearly and every year during the said term unto the said A. A. his executors, administrators, and assigns, the yearly rent or sum of _____ pounds, of lawful money of the United Kingdom of Great Britain and Ireland current in Great Britain; the same to be paid by equal quarterly payments, on the respective days following; namely, on the 25th day of March, the 24th day of June, the 29th day of September, and the 25th day of December in every year, (save and except, at all times during the said term, such proportionable part of the said yearly rent of _____ pounds as shall or may grow due during such time as the messuage or tenement hereby demised shall, without the hindrance of the said H. H. his executors, administrators, and assigns, be and remain uninhabitable by reason of accidental fire), and to be clear of all and all manner of parliamentary, parochial, and other taxes, assessments, rates, and deductions whatsoever; the first quarterly payment thereof to commence and be made on the 24th day of June next ensuing the date of these presents.

And the said H. H. doth hereby, for himself, his executors, administrators, and assigns, covenant, promise, and agree to and with the said A. A. his executors, administrators, and assigns, that he the said H. H. his executors, administrators, and assigns, shall and will yearly and every year

during the continuance of the said term hereby demised (save and except as aforesaid) well and truly pay, or cause to be paid, unto the said A. A. his executors, administrators, and assigns, the said yearly sum or rent of pounds, of lawful money of the United Kingdom of Great Britain and Ireland current in Great Britain, on the respective days, and in the manner the same is hereinbefore made payable; and also shall and will well and truly pay, or cause to be paid, all and all manner of taxes, assessments, rates, and impositions whatsoever, parliamentary, parochial, or otherwise, (the land-tax only excepted), which now are, or shall at any time during the continuance of the said term hereby demised be assessed, rated, or imposed on the said demised messuage or tenement and premises, or any part thereof, or on the said yearly rent hereby reserved, or any part thereof, or on the said H. H. his executors, administrators, and assigns, on account thereof. And also he the said H. H. his executors, administrators, and assigns, shall and will, at his and their own proper costs and charges, cause to be well and sufficiently painted all the outside wood and iron work belonging to the said messuage or tenement and premises hereby demised, every third year during the continuance of the said term; and, at his and their like proper costs and charges, shall and will at all times during the continuance of the said term keep in a good, sufficient, and tenantable state of repair, as well all and singular the glass and other windows, wainscots, rooms, floors, partitions, ceilings, tilings, walls, rails, fences, pavements, grates, sinks, privies, drains, wells, and watercourses, as also all and every other the parts and appurtenances of the said messuage or tenements and premises hereby demised, (damage happening by casual fire only excepted.) And further, that it shall be lawful for the said A. A. his executors, administrators, and assigns, either alone or with others, twice in every year during the said term hereby granted, at such times of the year as to him or them shall seem meet, to enter at seasonable times of the day into and upon the said messuage or tenement and premises hereby demised, and every part thereof, and there to view and examine the state and condition thereof, notice of such intention to view being at all times previously given unto the said H. H. his executors, administrators, and assigns, one day at least before the same shall take place; and in case any decay or want of reparation be found on such view, the said H. H. for himself, his executors, administrators, and assigns, doth hereby covenant, promise, and agree, to and with the said A. A. his executors, administrators, and assigns, to cause the same to be well and sufficiently repaired and amended within the space of six months after notice thereof in writing shall have been given to him or them for that purpose. And the said H. H. doth for himself, his executors, administrators, and assigns, promise, covenant, and agree, to and with the said A. A. his executors, administrators, and assigns, that he the said H. H. his executors, administrators, and assigns, at the end or earlier determination of the said term hereby granted, shall and will leave and yield up unto the said A. A. his executors, administrators, and assigns, all and singular the said messuage or tenement and premises, with their appurtenances, in such good, sufficient, and tenantable state of repair as aforesaid, together with all and every the doors, locks, keys, bolts, bars, chimney pieces, dressers, shelves, water pipes, and other things mentioned in an inventory or schedule* hereunder written, or hereunto annexed, in as good plight and condition as the same now are (reasonable use and wear thereof, and casualties happening by fire, only excepted). Provided always, and these presents are upon this express condition, that if the said yearly rent hereby reserved, or any part thereof, shall be in arrears and unpaid for the space of days next after any of the days whereon the same is hereinbefore covenanted to be paid as aforesaid (it being first lawfully demanded), or if the said H. H. his executors, administrators, and assigns, shall not

* This inventory must be stamped.

well and truly observe and keep, according to their true intent and meaning, all and every the covenants, clauses, provisoes, and agreements, by him and them to be observed and kept, then and from thenceforth, in either of the said cases, it shall be lawful for the said A. A. his executors, administrators, and assigns, to re-enter into and upon the said hereby demised messuage or tenement and premises, or any part thereof, in the name of the whole, and the same to have again, re-possess, retain, and enjoy, as his and their former estate; and the said H. H. his executors, administrators, and assigns, and all other tenants and occupiers of the said premises, thereout utterly to eject and remove; and that from and after such re-entry made, this lease, and every clause and thing herein contained, shall determine, and be utterly void to all intents and purposes, any thing herein contained to the contrary notwithstanding.

And the said A. A. for himself, his executors, administrators, and assigns, doth covenant, promise, and agree, to and with the said H. H. his executors, administrators, and assigns, by these presents, in manner following; that is to say: That he the said H. H. his executors, administrators, and assigns, paying the rent hereby reserved in manner aforesaid, and performing the covenants and agreements herein contained, and by him and them to be performed, shall and lawfully may peaceably and quietly hold, occupy, and enjoy the messuage or tenement, and all other the premises hereby demised, for and during the said term of twenty-one years hereby granted, without any lawful action, suit, or interruption of the said A. A. his executors, administrators, or assigns, or any other person lawfully claiming by, from, or under him, or any of them; and that he and they shall be freed and discharged, or otherwise by the said A. A. his executors, administrators, and assigns, saved harmless and indemnified from the rents and covenants reserved and contained in a certain indenture of lease, bearing date the

day of in the year of our Lord whereby the said A. A. holdeth the said messuage or tenement and premises hereby demised from the date hereof for the term of sixty-one years, and from all claims and demands whatsoever in respect thereof. And the said A. A. doth hereby further covenant, promise, and agree to and with the said H. H. his executors, administrators, and assigns, that the said A. A. his executors, administrators, and assigns, shall and will, before the expiration of this present lease, on the request, and at the costs and charges of the said H. H. his executors, administrators, and assigns, grant and execute unto him and them a new and fresh lease of the messuage or tenement and all other the premises hereby demised, with their appurtenances, for the further term of years, to commence from the expiration of the term hereby granted; the same to be at the same yearly rent, payable in like manner, and under and subject to the like covenants, provisoes, and agreements, (except a covenant for the renewal thereof at the end of such further term) as are contained in these presents: such new lease, however, to be granted and valid only on condition that the said H. H. his executors, administrators, and assigns, do execute a counterpart thereof, and also pay unto the said A. A. his executors, administrators, and assigns, the sum of pounds of lawful money of the United Kingdom of Great Britain and Ireland current in Great Britain, at the time of executing the said lease, as and by way of fine or premium for the renewal thereof. And also, that if the said H. H. his executors, administrators, and assigns, shall be desirous to quit the said messuage or tenement and premises hereby demised at the expiration of the first seven or first fourteen years of the term of twenty-one years hereby granted thereof; and of such his or their desire shall give notice in writing to the said A. A. his executors, administrators, and assigns, six calendar months before the expiration of the said first seven or fourteen years, as the case may be, then and in such case (all arrears of rent being duly paid, and the said messuage or tenement and all other the premises hereby demised

being in such repair as they are hereinbefore covenanted to be maintained and left in) this lease, and every clause and thing herein contained, shall, at the expiration of the first seven or fourteen years of the said term of twenty-one years hereby granted (whichever be in the said notice expressed), determine and be utterly void to all intents and purposes, in like manner as if the whole term of twenty-one years had run out and expired, any thing in these presents contained to the contrary notwithstanding. In witness whereof the said parties have hereunto set their hands and seals, the day and year first above written.

A. A. (Seal.)

H. H. (Seal.)

Scaled and delivered in the presence of

B. B. of

G. G. of

Assignment of Lease and Premises by Indorsement.

Know all men by these presents, that I, the within-named A. B. for the consideration hereinafter mentioned, have agreed to assign over unto N. O. (now or late servant to Elizabeth Long, of Saville-row, in the county of Middlesex, widow) his executors, administrators, and assigns, the within-mentioned messuage or tenement and premises. Now these presents witness, That, in pursuance of the said agreement, and for and in consideration of the sum of five pounds of lawful money of the United Kingdom of Great Britain and Ireland current in Great Britain, to the said A. B. in hand paid by the said N. O. at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, he the said A. B. hath granted, bargained, sold, assigned, transferred, and set over, unto the said N. O. his executors, administrators, and assigns, all that messuage, tenement, and all and singular other the premises in and by the within-written indenture of lease demised, or mentioned or intended so to be, with their and every of their appurtenances; and all the estate, right, title, interest, term of years to come and unexpired, property, claim, and demand whatsoever, of the within-named A. B. of, in, to, or out of the same premises, every or any part thereof, together with the said indenture of lease; to have and to hold the said piece or parcel of ground, and all and singular other the premises hereby or mentioned to be hereby assigned, with their and every of their appurtenances, unto the said N. O. his executors, administrators, and assigns, from the feast-day of St. Michael the Archangel now next ensuing the day of the date hereof, for and during all the rest, residue, and remainder, which shall be then to come and unexpired of the term of twenty-one years in and by the within-written indenture of lease granted thereof, (determinable, nevertheless, at the option of the said N. O. his executors, administrators, and assigns, at the end of the first seven or fourteen years of the term of twenty-one years within granted, upon the said N. O. his executors administrators, or assigns, giving such notice to the said A. B. his executors, administrators, and assigns, as the said A. B. is required to give in and by the within-written indenture), subject, nevertheless, to the payment of the rent, and performance of the covenants, in the same indenture of lease reserved and contained on the tenant's or lessee's part, from henceforth to be paid, done, and performed. [*Here may be added covenants for quiet enjoyment, for further assurance, and for indemnity.*]

In witness whereof the said parties have hereunto set their hands and seals, this fifth day of January, one thousand eight hundred and nineteen.

Witness, W. C.

A. B. (Seal.)

J. W.

N. O. (Seal.)

[*Note.*—This will require a deed stamp, besides the stamp on the deed.]

FORMS OF AGREEMENTS, FOR LEASES, FOR LETTING HOUSES, &c.

Agreement to grant a Lease of a House.

MEMORANDUM made this day of 1821, between A.B. of of the one part, and C.D. of of the other part, as follows: viz. First, the said A.B. doth hereby agree, at his own costs, with all convenient speed, to execute unto the said C.D. a lease of all that messuage late in the possession of E.D. situate in with the appurtenances, to hold to him the said C.D. his executors and assigns, from Midsummer-day now next ensuing, for the term of years, at and under the annual rent of pounds, payable quarterly, free of taxes (except the land-tax); which lease shall contain all the usual and reasonable covenants, and particularly certain covenants that the said A.B. shall allow out of the first year's rent of the said premises the sum of pounds towards the repair thereof; and that he shall also pay all the taxes in respect of the said house to Midsummer-day next; and shall also indemnify the said C.D. and his assigns from the ground-rent thereof during the said term; and that there shall also be inserted in the said lease an exception against damages happening by fire to the said premises during the said term: in consideration whereof the said C.D. doth hereby agree to accept such lease, and to execute a counterpart thereof when tendered to him for that purpose. As witness, &c.

Witness,

Agreement for a Lease of Garden Ground.

MEMORANDUM made this day of 1821, between H.B. of and C.D. of as follows: viz. The said H.B. in consideration of the rents and agreements hereinafter mentioned, doth agree to demise and let, by a good and sufficient lease in the law thereof, unto the said C.D. all that field, with the appurtenances thereunto belonging, situate at or near adjoining to, &c. late in the occupation of E.F. a gardener; together with all ways, paths, passages, waters, watercourses, easements, privileges, and appurtenances whatsoever, to the same belonging or appertaining, or therewith held, used, or occupied, possessed, enjoyed, accepted, reputed, taken, or known, as part, parcel, or member thereof or of any part thereof, to hold the same for the term of years from Christmas-day last past, at and under the yearly rent of pounds, payable quarterly: the first payment thereof to be made at Lady-day next ensuing the date hereof. And the said C.D. is to have full and free liberty to lop and top the trees and hedges of the said premises, at seasonable and convenient times, and to plough up and erect upon the same any shed or sheds, or other convenient buildings, during the said term, he from time to time scouring and cleansing the ditches, and making good the fences, hedges, and gates thereof. And the said C.D. in consideration thereof, doth agree to take the aforesaid premises for the said term, and at the said rent, payable in manner aforesaid, and to execute a counterpart of the aforesaid lease; and also to scour and cleanse the ditches, and repair make good, and keep up, the fences, hedges, and gates of the said premises. As witness, &c.

Witness,

An Agreement for a Lease of a Piece of Ground and Orchard for a Term of Five Years.

MEMORANDUM made this tenth day of December, in the year of our Lord one thousand eight hundred and twenty, between A. B. of the county of _____ and C. D. of the same place, as follows : that is to say, The said A. B. in consideration of the rent and agreements herein-after mentioned, doth agree to demise and let, by a good and sufficient lease in the law thereof, unto the said C. D. on or before the day of _____ now next, all that field, piece, or parcel of meadow-ground, containing by estimation six acres, more or less, situate at aforesaid, now in the occupation of the said C. D. as tenant at will thereof, adjoining to a house and grounds now or late in the occupation of E. F. and also all that orchard adjoining to the aforesaid field, containing by estimation two acres, more or less, late in the occupation of G. H. ; together with all ways, paths, passages, waters, watercourses, easements, privileges, and appurtenances whatsoever, to the same belonging or appertaining, or therewith held, used, occupied, possessed, or enjoyed, reputed, taken, or known, as part, parcel, or member thereof, or of any part thereof; to hold the same for the term of five years from Lady-day last past, at and under the yearly rent of twenty pounds, payable quarterly; the first payment thereof to be made at Midsummer now next ensuing the date hereof: and by the said lease full and free liberty shall be granted unto the said C. D. to lop and plash the trees and hedges on the said demised premises, at seasonable and convenient times, and also liberty to erect upon the same any shed or sheds, or other convenient buildings, during the said term; he the said C. D. from time to time scouring and cleansing the ditches, and repairing and making good the fences, hedges, and gates, upon and belongiug to the same premises. And the said C. D. doth agree to take the aforesaid premises for the said term and at the same rent, payable in manner aforesaid, and to execute a counterpart of the lease to be thereof granted. In witness, &c.

Witness,
I. K.

A. B.
C. D.

Agreement for the Purchase of a House and Premises.

MEMORANDUM made this _____ day of _____ 1820, between H. B. of _____ and C. D. of _____ as follows, viz. The said H. B. doth hereby agree, by good and sufficient conveyance in the law, at or before Christmas-day next, to assign, sell, and, convey, unto the said C. D. her heirs and assigns, free from all incumbrances whatsoever and howsoever, all those three houses, yards, and appurtenances, together with all and every the gates, locks, and fixtures therein and thereon, situate in _____ and also a piece of ground near thereto adjoining, in the possession of E. F. esquire; to hold unto her the said C. D. her heirs and assigns for ever, at and for the price or sum of _____ pounds, of lawful money of the United Kingdom of Great Britain and Ireland current in Great Britain, to be paid unto him by her, on a sufficient title being made out and executed unto her by him; and also to assign over unto her the several policies of insurance of the said houses, and to clear, pay, and discharge all taxes, charges, incumbrances, and impositions charged or assessed on the said premises, unto Christmas-day aforesaid, and to indemnify her, or reimburse her on account thereof.

And the said C. D. on her having by the conveyances aforesaid the said premises assigned and conveyed unto her, at or by the time aforesaid, and in manner aforesaid, doth hereby agree to pay unto the said H. B. the price or sum aforesaid for the same, and has now paid unto the said H. B. the sum of _____ pounds, in part of the purchase money aforesaid. As witness, &c.

Agreement for letting a House.

MEMORANDUM made the day of 1820, between
 A. B. of and C. D. of as follows: viz. The said A. B.
 doth hereby demise and let unto the said C. D. a house and garden, with
 the appurtenances, situate in in the county of
 late in the possession of E. F. and now of for the term of three
 years certain, and a quarter's warning or notice to be given or left in writing
 by either of the said parties, to or for the other of them, at the end of the
 said three years. The rent thereof to commence from Lady-day next, at
 and under the yearly rent of payable quarterly; the first pay-
 ment thereof to begin and be made at Midsummer-day next. And the
 said C. D. doth agree to take the said house of the said A. B. for the term,
 and at the said rent, payable in manner aforesaid; and also that he will,
 at his own costs and charges, make good, or cause to be made good, and
 put into the same or as good condition and order as the same lately was in,
 the kitchen or ground-room of or belonging to the said house, which he
 has now converted, or caused to be converted, into a cheesemonger's shop,
 at the expiration or other sooner determination of this present demise; and
 he will then leave on the said premises, for the use of the landlord, the
 paper hangings in the chambers, the back window shutters, the stone
 hearth, two shelves in the closet, one shelf in the kitchen, and another
 shelf in the wash-house, of and belonging to the said house. As
 witness, &c.

*Agreement for letting a House, with a Covenant for a Lease, at the option
 of the Lessee.*

MEMORANDUM made the day of 1820, between
 C. D. of and E. F. of as follows: viz. The said C. D. in
 consideration of the rent hereinafter mentioned and agreed to be paid to
 him; hath demised, and hereby doth demise and let, unto the said E. F. a
 messuage or tenement situate and being in
 in the parish of in the county of
 to hold to the said E. F. for the term of one year, to commence from
 Christmas-day next, at the yearly rent of pounds, to be
 paid quarterly; and the said C. D. doth hereby agree, by or before Christ-
 mas day next, well and sufficiently to repair, amend, and put in good and
 tenantable order and condition, the said house with its appurtenances, in
 all needful and necessary reparations and amendments whatsoever, in case
 the same is not already in such good and sufficient repair and condition,
 and the same premises so to continue and keep in such repair from thence-
 forth, for and during all such time as the said E. F. shall be and continue
 therein as tenant at will only. The said E. F. in consideration thereof,
 doth hereby agree to take and rent the said house of the said C. D. for the
 term and at the rent payable as aforesaid; which said rent she agrees to pay
 unto him quarterly. And it is hereby mutually agreed between the said
 parties, that, after the expiration of the said term of a year, if either of
 them shall be minded or desirous to quit, leave, or part with each other, or
 from the said premises, she or he shall give one quarter's warning or notice
 in writing thereof to the other of them. And if, after the said term of a
 year be expired, she the said E. F. shall be minded or desirous to have and
 take a lease of the said premises, with the common and usual covenants,
 for a further term of three or seven years at pounds a year,
 payable quarterly, and of such her intention and desire shall give notice
 in writing to the said C. D. within three months after the expiration of
 the said term of a year, that then he the said C. D. shall and will grant

her such lease for such further term or terms, and at such rent, and payable as aforesaid; the costs and charges of such lease (if demanded by the said E. F.) to be paid and discharged equally by and between the said parties. As witness, &c.

Witness,

An Agreement for letting a First and Second Floor, Garret, and Kitchen, unfurnished.

MEMORANDUM, That it is hereby declared and agreed by and between A. B. of in the county of and C. D. of in manner following; that is to say, That the said A. B. hath agreed to let, and hereby doth let, and the said C. D. hath agreed to take, and hereby doth take, all the first and second floor, front garret, and front kitchen, with the conveniences and appurtenances thereto belonging, of the house now in the occupation of the said A. B. situate at aforesaid, together also with two cellars adjoining to each other under the pavement of the said street, and to the said house belonging; to hold the same with their appurtenances, and the sole uninterrupted use and occupation thereof, unto the said C. D. his executors, administrators, and assigns, for the term of twelve calendar months, to commence from the twenty-fifth day of March now next ensuing, at the net yearly rent of thirty-six pounds for the year, payable quarterly, on the twenty-fourth day of June, the twenty-ninth day of September, the twenty-fifth day of December, and the twenty-fifth day of March, thence next ensuing: and the said A. B. doth agree to paint the second floor of the said demised premises, and have the same fit for occupation, by the said twenty fifth day of March next, or as soon thereafter as may be: and the said C. D. doth engage to make punctual payment of the rent hereby reserved, in the manner aforesaid, and to quit and leave the said hereby demised premises at the expiration of the said term of twelve months (notice to quit being given to the said C. D. at least three calendar months previously thereto) in as good state and condition as reasonable use and wear thereof will permit. As witness our hands this second day of March, one thousand eight hundred and eighteen.

Witness,
E. F.
G. H.

A. B.
C. D.

Agreement for letting a ready furnished Lodging.

MEMORANDUM made this day of 1820, between H. B. of the parish of in the county of grocer, and C. D. of gentleman, as follows:—First, the said H. B. agrees to let unto the said C. D. a room up two pair of stairs forwards in his house, situate in street, in the parish and county aforesaid, ready furnished; together with the use of his maid-servant, in common with other lodgers, at such hours and times when he himself can spare her, and also the use of a cellar for coals and beer, at and after the rate of pounds a year, payable quarterly. And it is further agreed, that if either party shall quit or leave the said premises, he or they respectively are to give or take a quarter's warning. The said C. D. agrees to take the said room of the said H. B. at the rate or price, and payable as aforesaid; and also to find or provide for himself all manner of linen and china-ware whatsoever, that he shall have occasion to make use of therein. And that if he shall damage or break any part of the furniture of the said H. B. that he will amend, make good, or pay for the repairing the same. As witness, &c.

An Agreement for letting a First Floor furnished, for Half a Year certain, and from Quarter to Quarter, as long as the Parties shall agree.

MEMORANDUM, made this second day of June, 1821, between C. D. of, &c. and E. F. of, &c. as follows:—The said C. D. doth let unto the said E. F. an entire first floor completely furnished as the same now is (which furniture is particularly mentioned in a schedule hereunder written), being part of the house which he the said C. D. now lives in, situate and being in to have and to hold the said premises for and during the term of half a year, to commence from Midsummer-day next ensuing, at and after the rent of fifty pounds per annum, of lawful money of Great Britain, payable quarterly, by even and equal portions; the first quarterly payment thereof to be made on Michaelmas-day next ensuing the date hereof. And it is further agreed by and between the parties hereto, that the said E. F. after the expiration of the said term of half a year, may hold and enjoy the said premises hereby let unto him, from quarter to quarter, so long as both parties shall agree, at the same rent as aforesaid. And it is also further agreed between the parties, that when the said E. F. shall quit the said premises hereby demised to him, he shall and will leave the furniture and other things mentioned and set forth in a schedule or inventory thereof hereunder written, in as good state and condition as the same now are, reasonable and proper use thereof only excepted. As witness our hands the said second day of June, one thousand eight hundred and twenty-one.

Witness,
G. H.

C. D.
E. F.

Inventory to which the above Agreement refers.

IN THE FRONT ROOM, ONE PAIR OF STAIRS.

- 6 Mahogany chairs with hair bottoms
- 1 Mahogany dining table
- 1 Pembroke table
- 12 Prints of Hogarth's Rake's Progress
- 2 Fire screens
- 3 Festooned cotton window curtains
- A Wilton carpet, 3 yards by 2 and a half.

IN THE BACK ROOM, DITTO.

A four-post bedstead and bed, cotton furniture, white counterpane, 3 blankets, 2 pair of sheets, and mattress, &c. (as the case may be.)

Witness,
G. H.

C. D.
E. F.

[N. B. These agreements must be on a stamp, but it is not necessary that they should be stamped before they are signed; it may be done within twenty-one days afterwards.]

FORMS OF NOTICES TO QUIT.

Notice from a Landlord to a Tenant to quit House and Premises.

I hereby give you notice to quit, on or before Midsummer-day next, the house and garden you hold of me, at the rent of _____ pounds per annum. Dated the _____ day of _____ 1820.

Your's,

To Mr. Thomas Gillis,
Halton Garden.

RICHARD DAWSON,
Landlord of the said House
and Premises.

Notice to quit at the end of the next yearly Tenancy.

SIR,

I hereby give you notice to quit and deliver up, on the day of next, the possession of the messuage or dwelling-house, with the appurtenances, which you now hold of me, situate in the parish of in the county of provided your tenancy originally commenced at that time of the year; or otherwise, that you quit and deliver up the possession of the said messuage or dwelling house with the appurtenances at the end of the year of your tenancy which shall expire next after the end of half a year from the time of your being served with this notice. Dated the day of 1821.

To Mr. _____,
the Tenant in Possession.

Your's &c.
[Signed by the Landlord.]

[N. B. The notice or warning to quit must be in writing, and directed to the tenant who is in possession of the premises, at least six months before that time of the year at which the tenancy originally commenced.]

Notice from Landlord to Tenant to quit Apartments.

SIR,

I hereby give you notice to quit and deliver up, on or before the 25th of December next, the apartments and other tenements which you now hold of me in this house. Witness my hand this 20th day of September, 1821.

WILLIAM THOMSON.

Notice from Landlord to Tenant either to quit the Farm and Premises, or pay double Rent.

SIR,

I hereby give you notice to quit and deliver up, on or before the 5th day of January next, the house, farm, lands, and tenements, which you now hold of me, situate in Islington, in the county of Middlesex; in default whereof I shall require for the same the net yearly rent of one hundred pounds (being double the present yearly rent thereof) for such time as you shall thereafter continue possession. Dated this fourth day of October, 1820.

To Mr. George Elliott,

THO. BENJ. BROADHEAD,
Landlord of the said Premises.

Another from the Landlord's Agent to the Tenant.

I hereby demand of you, and give you notice, that you are to deliver up the possession of the house with the appurtenances in the parish of in the county of now in your own occupation, to Mr. A. B. your landlord, at Lady-day next ensuing the date hereof; and, in default of your compliance therewith, the said A. B. doth and will insist upon your paying unto him from thenceforward, for the same, the yearly rent or sum of pounds, being double the former rent or value thereof, for so long time as you shall detain the key, and keep possession of the said premises over the said notice. Given under my hand this day of in the year of our Lord 1821.

To Mr. F. G.
the Tenant.

N. M. Agent to the said
Mr. A. B. legally authorized.

Notice from Tenant to Landlord to quit House and Premises.

SIR,

I hereby give you notice, that I shall quit the house and premises I now hold of you, situate No. 27, Holborn, on Michaelmas-day next. Dated this first day of July, one thousand eight hundred and twenty-one.

To Mr. Johnson,
No. 5, Gloucester Street.

Your's,

ROGER COOKE.

Notice from a Tenant to a Landlord to quit Apartments.

SIR,

I hereby give you notice, that on the twenty-fifth day of December next I shall quit and deliver up the apartments and other tenements I now hold of you in this house. Witness my hand this nineteenth day of September, one thousand eight hundred and twenty-one.

ABEL SIMONS.

PRACTICAL DIRECTIONS FOR MAKING A DISTRESS.

THOUGH the landlord himself may make the distress, it is generally made by some person employed by him; in which case the landlord must give to such person an authority in writing, called a warrant of distress.

Letter of Attorney to empower a Person to distrain.

KNOW all men by these presents, That I, A. B. of the parish of _____ in the county of _____ Esq. for divers good causes and considerations me hereunto moving, have made, nominated, authorized, constituted, and appointed, and by these presents do make, nominate, authorize, constitute, and appoint C. D. of _____ in the county aforesaid, Esq. and E. F. of the said place, gentleman, jointly and severally, my true and lawful attorney and attorneys, for me, and in my name, place, and stead, either jointly or severally, to enter into and upon all that messuage or tenement, farms, lands, hereditaments, and premises, situate and being in the parish of _____ in the county aforesaid, or one of them, and now in the tenure or occupation of G. H. yeoman, his under-tenants or assigns, and held by him of me at or under the yearly rent of _____ pounds, and to make or cause to be made, one or more distress or distresses on all or any hay, corn, goods, chattels, cattle, beasts, sheep, or other effects or things whatsoever, standing, lying, or being in or upon the said demised premises, or any part thereof, for all such rent or rents, as was or were due, owing, or in arrear unto me at Michaelmas-day last past, for or on account of the said premises, or any part thereof; and such distress or distresses, when made or taken, for me and on my behalf, to hold, detain, and keep, or cause to be held, detained, and kept, until payment and satisfaction be made unto me for all such rent due and in arrear unto me, and all costs and charges of making such distress; and, in case of non-payment thereof within the time limited, after such distress made, by the laws now in force, to appraise, sell, and dispose of the same, or cause the same to be appraised, sold, and disposed of according to law; I, the said A. B. hereby giving and granting unto my said attorneys and attorney, jointly and severally, full power and authority, for me and in my name, on my behalf, to do or cause to be done, all such acts, matters, and things whatsoever, touching, concerning, or any ways relating to the said premises,

as shall or may be necessary to or for the purposes aforesaid, as fully and effectually, to all intents and purposes whatsoever, as if I myself was personally present, and did the same, hereby ratifying, confirming, and allowing, all and whatsoever my said attorneys or attorney, or either of them, shall lawfully do, or cause to be done, in or about the said premises, by virtue of these presents. In witness whereof, I the said A. B. have hereunto set my hand and seal this day of in the year of our Lord one thousand eight hundred and twenty-one.

A. B.

Sealed and delivered (being first duly }
stamped) in the presence of us, }

Form of a Warrant to Distrain.

Know all men by these presents, That I, F. G. of London, Esq. do hereby authorize and appoint T. C. of gentleman, to take any person or persons to his assistance, and to enter into the house of A. B. in and there make a distress of all such goods and chattels as are in and upon the premises, or any part thereof, for pounds, for one half year's rent due to me the said F. G. at Michaelmas-day last; and, after the said goods are so distrained, if the said A. B. does not, within the time limited by law, pay the said rent, or replevy the said goods, then and in such case I do hereby authorize you the said T. C. to cause the said goods to be appraised, and, according to such appraisement, to make sale thereof to such person or persons who will buy the same, and to dispose of the money arising by the sale in such manner as by the statute made for that purpose is directed: and for your so doing this shall be your sufficient warrant. Witness my hand and seal, this day of in the year of our Lord one thousand eight hundred and twenty-one.

F. G.

The Form of an Authority given by a Landlord to empower another to distrain for him.

Mr. A. B.

I do hereby authorize you to distrain the goods and chattels of T. P. on the premises now in his possession, situate at in the county of for pounds, being half a year's rent due to me for the same at Lady-day last; and for your so doing this shall be a sufficient warrant of authority.

Dated this day of one thousand eight hundred and twenty-one.

G. H.

The proper and regular way of making a distress for rent in arrear is, to go upon the premises for which the rent is due, and take hold of some piece of furniture or other article there, and say (if the distress be made by the landlord himself), "I seize this chair (or other thing, as the case may be) in the name of all the goods and effects on these premises, for the sum of 20*l.* being half a year's rent due to me at Lady-day last." Or (if the distress be made by some person empowered by the landlord) say, "for the sum of 20*l.* due to I. T. Esq. the landlord of these premises, at Lady-day last, by virtue of an authority from him the said I. T. Esq. to me given for that purpose."

An inventory is then to be made of so many of the goods, &c. as will be sufficient to recover the rent and expences of the distress, appraisement, and sale; which is not required to be on a stamp, as the 23 Geo. III, c. 58. § 51, expressly excepts an inventory of goods distrained.

The person who distrains the goods may take the inventory. An appraiser is not necessary till after the end of the five days allowed the tenant by 2 W. & M. to pay the rent or replevy the goods.

The inventory being taken, you must make a fair copy of it, and write at the bottom a notice to the tenant, to inform him that such distress has been made, and of the time when the rent and charges of the distress must be paid, or the goods replevied; which, with the notice thereunder written, must be either given to the tenant himself, or to the owner of the goods. Or must be left at the house, with any person dwelling therein; or if there be no person in the house, on the table in the kitchen, or some other notorious part of the house. It is proper to have another person with you when you make a distress, to examine the inventory, and to be witness of the transaction, if called on for that purpose.

The safest way is to remove the goods immediately, and in the notice to acquaint the tenant where they are removed to; but it is now most usual to let them stay on the premises, and leave a man in possession to protect them till you are entitled to sell them by law, which is on the seventh day, because the statute says, you are to give five days' notice, and it is held and understood to be five whole days, which must be exclusive of the day the distress was made.

The man in possession of the goods is to be paid two shillings and sixpence per day, if kept by the tenant, and three shillings and sixpence if he keeps himself.

Form of an Inventory and Notice to be served on a Tenant when Distress is taken of his Goods, &c. for Rent Arrear.

An Inventory of the several goods and chattels distrained by me, W. J. the tenth day of April, one thousand eight hundred and twenty-one, in the dwelling-house (or otherwise, as the case may be) of T. P. situated at _____ in the county of _____ by the authority and in the behalf of J. F. the landlord of the said premises, for twenty pounds, being half a year's rent due to him the said J. F. at Lady-day last, and as yet in arrear and unpaid.

£. s. d.

I. In the Kitchen.

2 Wainscot tables	
6 Old chairs	
3 Copper saucepans	
2 Pottage pots, &c.	

II. In the Parlour.

1 Large pier looking-glass	
2 Sconces in gilt frames	
2 Mahogany card-tables, &c.	
1 Pembroke table	

III. In the Dining-Room.

6 Hair-bottom chairs, mahogany frames, &c.	
1 Set of dining tables	

Mr. T. P.

TAKE notice, that I, as bailiff to Mr. J. F. have this day distrained the goods and chattels mentioned in the above inventory for the sum of twenty pounds, being half a year's rent due at Lady-day last, for the premises above-mentioned, and have secured the goods and chattels in the front parlour of the said house; and that unless the said arrears of rent

and charges of distress are paid, or the goods and chattels replevied within five days from the date hereof, the said goods will be appraised and sold according to law.

Dated, &c.

W. J.

A TRUE copy of the above inventory and order was this day of _____ 1821, delivered to the above-mentioned T. P. in the presence of us,

JOHN MARTIN,
GEO. ELLIOTT.

[N. B. If the goods are secured off the premises, what relates to the securing the goods must be omitted, and the notice must inform the tenant of the place where.]

If the sheriff is in possession of the goods of a tenant on an execution, the landlord need not make a distress, but should forthwith serve him with the following notice.

To B. C. Esq. Sheriff of the County of _____

TAKE notice, that there is now due from T. P. the person to whom the goods belong you are now in possession of by virtue of his Majesty's writ of fieri facias, &c. returnable [here mention the return] the sum of _____ pounds, for half a year's rent due at Lady-day last. As witness my hand, this _____ day of _____ 1821.

J. F. Landlord of the Premises.

But where there is no sheriff in possession on an execution, and the tenant wants further time to raise the money, and the landlord chooses to give him such indulgence, he must take a memorandum from the tenant, that possession is continued at his request, and by his desire, or the landlord will be a trespasser in continuing the same beyond the time limited by the statute, and liable to an action for so doing. It may be in the following words:—

Form of a Tenant's Consent to the Landlord's continuing in possession, upon the Premises, of Goods distrained, after the seventh day.

I, T. P. do hereby consent, that J. F. my landlord, who, on the seventh day of April last, distrained my goods and chattels for rent due to him, shall continue possession thereof on the premises for the space of seven days from the date hereof; the said J. F. undertaking to delay the sale of the said goods and chattels for that time, in order to enable me to discharge the said rent. And I, the said T. P. do hereby agree to pay the expences of keeping the said possession. Witness my hand this seventeenth day of April, one thousand eight hundred and twenty-one.

T. P.

If no further time should be allowed, at the expiration of the fifth day from the time of the distress and notice, the sheriff's office should be searched, to know if the goods have been replevied. If they have not, go to the premises; where, if the rent and charges of the distress are not paid, you should send for a constable of the hundred, parish, or place, where the goods were distrained, and two sworn appraisers, who, having viewed the goods, must be sworn by the constable in the usual way.

If the distress is taken in two hundreds, the constable of the place where the distress is driven or put is the proper officer within the 2 W. & M.

The Appraisers' Oath.

You, and either of you, shall make a true appraisement of the goods now shewn to you, and mentioned and contained in this inventory, [*the constable having at the same time the inventory in his hand, shewing the same*] according to the best of your judgment.

So help you God.

[N. B. The sheriff, under-sheriff, or constable, are empowered to swear them.]

Memorandum of the Appraisers being sworn.

MEMORANDUM, that on the _____ day of _____ 1821, S.M. of _____ and D. L. of _____ two sworn appraisers, were sworn on the Holy Evangelists by me, W.O. of _____ constable, to make a true appraisement of the goods and chattels mentioned in this inventory, according to the best of their judgment. Witness my hand,
W. O. Constable.

After the appraisers are sworn, and have viewed and valued the goods, indorse the following memorandum on the inventory for the appraisers to sign :—

Memorandum to be indorsed.

WE, the above-named S.M. and D.L. being sworn on the Holy Evangelists by W.O. constable above named, to make a true appraisement of the goods and chattels mentioned in the above inventory according to the best of our judgment, and having viewed the said goods and chattels, do adjudge and value the same at the sum of _____ pounds, and no more. As witness our hands this _____ day of _____ 1821.

S. M. }
D. L. } *Sworn Appraisers.*

After the goods are sold for the best price you can get for the same, you must deduct the arrears of rent, and all reasonable charges ; and the overplus (if any) must be paid or applied to the tenant's use.

By a late act of parliament, the charges for making a distress for a small amount are regulated ; for the particulars of which the reader is referred to page 34 of this work :

A person distraining cannot be one of the sworn appraisers, he being interested in the business.

The goods being thus valued, they are usually bought by the appraisers at their own valuation ; and a receipt at the bottom of the inventory, witnessed by the constable, or other person who swore them, is usually held a sufficient discharge.

If a distress be of considerable value, it is advisable to have a proper bargain and sale between the landlord, the constable, the appraisers, and the purchaser, for the better proving the transaction afterwards, should it be found necessary.

If the tenant means to replevy the distress, he must, within five days after he has had notice of the distress, take with him two housekeepers, living in the city or county where the distress was made, and go to the sheriff's office of such city or county ; where he must enter into a bond, with the two housekeepers as sureties, in double the value of the goods distrained (such value to be ascertained by the oath of one or more witnesses not interested, which oath the person granting such replevin is to administer) conditioned for the prosecution of a suit in replevin against the distrainer with effect, and for returning the goods if a return thereof shall be awarded : upon this the sheriff will direct a precept to one of his bailiffs ; and by that means the possession of the goods will be restored to the tenant, to abide the event of the suit in replevin.

FORMS OF WILLS AND CODICILS.

Form of a last Will and Testament, disposing of Goods, Money, and Personal Effects, and not containing any Devise of Lands.

IN THE NAME OF GOD, AMEN.—I, John Mills, of Cheapside, in the parish of St. Mary-le-Bow, in the city of London, linen-draper, being of sound and disposing mind, memory, and understanding, but mindful of my mortality, do this day of in the year of our Lord make and publish this my last will and testament, in manner and form following; that is to say:—First, I desire to be decently and privately buried in the church-yard belonging to the parish in which I shall happen to die, without any funeral pomp, and with as little expence as may be; and I give and bequeath unto the poor of such parish the sum of 10*l.* to be distributed in such proportions and manner as my executrix, herein-after named, shall think fit. Also, I give and bequeath unto my eldest son, John Mills, the sum of 500*l.* Also, I give and bequeath unto my second son, William Mills, the like sum of 500*l.* Also, I give and bequeath unto my daughter, Mary Roe, the like sum of 500*l.* The said several and respective legacies to be paid unto them severally and respectively, immediately after the expiration of one year after my decease. Also, I give to my three grand-daughters, Sarah, Catharine, and Mary, children of my second daughter, Mary Roe, the sum of 100*l.* each. And I do desire that the said several sums of 100*l.* shall, within the space of one month after my decease, be placed and invested in some or one of the public funds of this kingdom, at the discretion of my executrix herein-after named: and that the said several sums of 100*l.* or the funds or securities to be purchased therewith, shall be paid and transferred to my said grand-daughters respectively, when and as they shall severally and respectively attain their several and respective ages of twenty-one years, or day or days of marriage, which shall first happen; and that the interest accruing and arising therefrom in the mean time shall be applied towards their education and maintenance respectively, until they shall severally and respectively attain their said ages, or day or days of marriage aforesaid; and in case any or either of them the said Sarah, Catharine, and Mary, shall happen to die before her or their attaining their said age of twenty-one years, and unmarried, then I give the share of her or them so dying unto the survivors or survivor of them; and if all my grand-daughters shall happen to die before the attaining the age of twenty-one years, and unmarried, then I give and bequeath the whole of the said several sums of 100*l.* making in the whole the sum of 300*l.* unto my said daughter Mary, if she shall be then living. And whereas John Doe, of Fleet Street, London, barber, is indebted to me in the sum of 200*l.* principal money, upon bond; now I do hereby give, forgive, and release unto the said John Doe the sum of 100*l.* part of the said sum of 200*l.* and do hereby will and direct that my executrix, hereinafter named, do excuse and release the said sum of 100*l.* to him. Also, I give to my wife, Mary Mills, the use of all my plate, household goods, and furniture whatsoever, which shall be in my dwelling-house at the time of my death, during her lifetime; and, after her decease, I give the same to my son J. Mills, his executors, administrators, and assigns. And as to all the rest, residue, and remainder of my estate, whatsoever and wheresoever, and of what nature, kind, and quality soever the same may be, and not hereinbefore given and disposed of, after payment of my debts, legacies, funeral expences, and the expence of proving this my will, I do hereby give and bequeath the same, being all personal, unto my dear wife, the said Mary Mills, her execu-

sons, administrators, and assigns, to and for her and their own use and benefit absolutely; and I do hereby make, ordain, constitute, and appoint my said wife, Mary Mills, sole executrix of this my last will and testament, hereby revoking all former and other wills and testaments by me at any time heretofore made. In witness whereof I have to this my last will and testament set and subscribed my hand and seal, the day and year first above written.

Signed, sealed, published, and declared,
by the said testator, John Mills, as and
for his last will and testament, in
the presence of us, who, at his request,
in his presence, and in the presence
of each other, have hereunto sub-
scribed our names as witnesses thereto.

JOHN MILLS.

[Place of
the seal]

C. P.
L. M.

Form of a Will disposing of Lands only.

THIS is the last will and testament of me, John Doe, of Fleet Street, in the city of London, gentleman, being of sound and disposing mind, memory, and understanding. First, I give, devise, and bequeath, unto Richard Roe the younger, of Fleet Street, aforesaid, gentleman, all those my freehold messuages, lands, tenements, hereditaments, and premises, with the appurtenances whereof I am seised in fee, situate, lying, and being at Cheshunt, in the county of Hertford, and now or late in the several tenures or occupations of John Mills, &c. (*mentioning the names of the tenants of the premises*), or some or one of them, their or some or one of their under-tenants or assigns, to have and to hold all and every the said lands, tenements, and hereditaments, with the appurtenances, situate as aforesaid, to him the said Richard Roe, his heirs and assigns for ever. Also I give, devise, and bequeath to my second son, William Doe, all that my freehold farm, lands, and premises, situate at Cheshunt aforesaid, and now in the possession of Richard Fenn, as tenant thereof to me, to hold the same farm, lands, and premises, unto my said son, William Doe, for and during the term of his natural life; and from and immediately after his decease, I give, devise, and bequeath the said farm, lands, and premises, to my grand-daughter, Mary Doe, her heirs and assigns for ever. Also, I give and bequeath unto William Thomas, of Islington, in the county of Middlesex, esquire, all those my copyhold lands, messuages, tenements, and hereditaments, (and which I have surrendered to the use of my will), situate, lying, and being at Enfield, in the county of Middlesex, and which now are or lately were in the tenure or occupation of Edward Reeves, his under-tenants or assigns, to have and to hold the said copyhold lands, messuages, and tenements, to the said William Thomas, his heirs and assigns for ever, according to the custom of the manor of which the same are holden. And I do hereby also give, devise, and bequeath unto my said son, William Doe, all those my four freehold messuages or dwelling-houses, situate in Fleet Street, London, aforesaid, being Nos. 106, 107, 108, and 109, and now being in the several tenures or occupations of, &c. [*mentioning the tenants' names*] to have and to hold the same to my said son, William Doe, and to the heirs of his body lawfully begotten or to be begotten; and for default of such heirs, then to the right heirs of me the said John Doe, for ever. Also, I give, devise, and bequeath unto John Denn, of Cheapside, London, mercer, and Richard Fenn, of Fleet Street, London, aforesaid, linen-draper, all that my freehold estate, farm, lands, and premises, whereof I am seised in fee, situate, lying, and being at Hackney, in the county of Middlesex, and

now in the tenure or occupation of Henry Roberts, as tenant to me of the same, under a lease of twenty-one years, from Lady-day, 1783, to have and to hold the same estate, farm, lands, and premises, with the appurtenances, unto the said John Denn and Richard Fenn, [their heirs and assigns for ever, as tenants in common, and not as joint-tenants].† And as to all the rest, residue, and remainder, of my real and copyhold estates whatsoever, and wheresoever the same may be situate, lying, and being, I do hereby give, devise, and bequeath the same to my said son, William Doe, to have and to hold the same to my said son, William Doe, his heirs and assigns for ever. In witness whereof I, the said John Doe, have to this my last will and testament set and subscribed my hand and seal, the 20th day of March, in the year of our Lord 1820.

Signed, sealed, &c. (as in the attestation
to No. 1.)

JOHN DOE. [Place of
the seal.]

[To be executed in the presence of, and signed by THREE witnesses.]

Re-publication of the foregoing Will.

WHEREAS since the making and publishing of the above last will and testament of me the said John Doe, I have purchased divers freehold lands, messuages, tenements, hereditaments, and premises, situate in the several counties of Hertford and Middlesex: now I do hereby re-publish my said last will and testament, and do hereby declare that it is my desire and intention, that the said will and testament shall be good and valid, to all intents and purposes, as if the same had this day been originally made and published; any act, deed, matter, or thing whatsoever, by me heretofore done, committed, or omitted, to the contrary hereof in any wise notwithstanding. In witness whereof I have hereunto set and subscribed my hand and seal, this first day of May, in the year of our Lord 1820.

Signed and sealed by the said testator,
John Doe, in the presence of us,
who at his request, in his presence,
and in the presence of each other,
have subscribed our names as wit-
nesses to the above re-publication of
his said last will and testament.

JOHN DOE.

[Place of
the seal.]

[To be executed in the presence of, and signed by THREE witnesses, in the same manner as the original will.]

A Will of Freehold, Copyhold, Leasehold, and Personal Estates; in which the Testator devises the same to Trustees, to secure an Annuity to his Wife, and also to provide for any Children that he might have by her; and, in Default of Issue, he devises the same, subject to the Annuity, &c. to the eldest Son of his Uncle; charged with the Payment of Moneys.

IN THE NAME OF GOD, AMEN.—I, James Jones, of Charles Street, in the county of Middlesex, esquire, being of sound and disposing mind and memory, do make this my last will and testament, in manner following: First, and principally, I commend my soul to God who gave it; and my body I commit to the earth, to be decently interred at the discretion of my executors hereinafter named; and as to such worldly estate as God of his goodness hath bestowed upon me, I give and dispose thereof as follows; that is to say:—I give and devise unto and to the use of my dear wife Mary

† If it is intended to make the devisees joint tenants, the words of the devise are to be exactly similar till the beginning of the brackets, and then, instead of the words inserted between them, say, “and the survivor of them, his heirs and assigns for ever, as joint-tenants, and not as tenants in common.”

Jones, Nathaniel Nokes of and Oliver Orme of their heirs and assigns, all and every my freehold and copyhold estates, upon the trusts nevertheless hereinafter declared of and concerning the same; and I give, devise, and bequeath all my leasehold estates, as well for lives as for years, together with all my personal estate, of what nature or kind soever, unto the said Mary Jones, Nathaniel Nokes, and Oliver Orme, and their heirs, executors, administrators, and assigns respectively (according to the nature of the several estates), upon the trusts nevertheless, and to and for the several intents and purposes hereinafter expressed and declared of and concerning the same; that is to say: upon trust, by and out of the rents, issues, dividends, interest, and profits of all my said estates, to pay an annuity or yearly sum of five hundred pounds, clear of all taxes and deductions whatsoever, into the proper hands of my said dear wife Mary Jones, during her natural life, for her own use and benefit, in addition to all other provisions made for her upon or previous to our intermarriage; and also by the ways and means aforesaid to pay one other annuity or yearly sum of pounds, clear of all taxes and other deductions, into the proper hands of my dear sister, Sarah Howel, the wife of Mr. Giles Howel, during her natural life, or to such person or persons as she shall from time to time, half-yearly, and not otherwise, by any note or writing signed with her hand, direct or appoint to receive the same, and so as that the last-mentioned annuity shall not, nor shall any part thereof, be subject or liable to the debts, engagements, management, or controul of her husband, nor in either of their power to sell, anticipate, assign, or any way to dispose of or incumber the same; the said annuities respectively to be paid and payable by half-yearly payments, on the feast-days of St. Michael the Archangel, and the birth of our Lord Christ in each year, by even and equal portions, the first payment of the same respectively to begin and be made on such of the said feast-days as shall first happen after my decease: and upon further trust, that the said Nathaniel Nokes and Oliver Orme shall and may retain the sum of pounds each, for their trouble in performing the trusts of this my will: and upon this further trust, that they, the said Mary Jones, Nathaniel Nokes, and Oliver Orme, and the survivors and survivor of them, his or her heirs, executors, administrators, or assigns, do and shall, at the end of one year next after my decease, if there shall be any child or children of my body by the said Mary my wife then living, convey, assign, and transfer, in such manner as counsel shall advise, all the rest and residue of my freehold, copyhold, and leasehold estates, money in the funds, and all other my personal estate and effects, of what nature or kind soever the same may be, subject to, and charged with the payment of the said several annuities of five hundred pounds and pounds as aforesaid, or such of them as shall be then subsisting, unto my eldest or only child, his or her heirs, executors, administrators, and assigns, absolutely for ever; but in case there shall not be any child living at the end of one year next after my decease, shall and do convey, assign, and transfer, by such advice as aforesaid, all such rest and residue of my freehold, copyhold, and leasehold estates, money in the funds, and all other my said personal estates, subject and chargeable as hereinbefore mentioned, unto the eldest son then living of my uncle John Jones, of esquire, his heirs, executors, administrators, and assigns, absolutely for ever; such eldest son nevertheless paying thereout, or to the good liking of my said trustees securing to be paid thereout, unto each and every of his younger brothers the sum of three thousand pounds. And I do hereby constitute and appoint my said dear wife Mary Jones, the said Nathaniel Nokes, and Oliver Orme, executors of this my last will and testament, hereby revoking and annulling all former and other wills by me at any time heretofore made. And my will is, and I do hereby direct, that my said executors and trustees shall each of them be answerable for her and his act

and receipts only, and not the one of them for the other of them; and that they shall not be answerable for any loss or miscarriage by any security or securities that may happen in my estate; and also that they shall retain all their costs, charges, damages, and expences out of the estates and effects in them respectively vested in and by this my will, and the trusts therein contained. In witness whereof, &c.

Signed, sealed, published, &c.

JAMES JONES.

[To be signed by three witnesses.]

[Place of
the seal]

Will of Personal Property to Executors for Payment of Debts, with Powers for them to compound, &c.

THIS is the last will and testament of me, George Young, of whereby I give and bequeath unto John and Edward Yates, both of whom I appoint executors of this my will, all my ready money, and all such sums of money as shall be owing to me at the time of my decease, upon mortgages, by specialty, or simple contract, and all and singular other my personal estate and effects whatsoever and wheresoever, not hereinafter by me otherwise disposed of; upon trust, that they the said John and Edward Yates, or the survivor of them, or the executors, administrators, or assigns of such survivor, do and shall, with all convenient speed after my decease, call in and compel payment of all such part of my personal estate as shall consist of money owing upon securities or otherwise, and do and shall sell and dispose of and convert into money all such part or parts thereof as shall not consist of money: and my mind and will is, that it shall and may be lawful to and for the said John and Edward Yates, and the survivor of them, and the executors, administrators, and assigns of such survivor, to compromise or compound any sum or sums of money owing to me at the time of my decease, and to adjust, settle, and compromise all accounts which at the time of my decease shall be depending between me and any other person or persons whomsoever, and to give or allow such reasonable time or indulgences for the payment of the same respectively, and in the mean time to accept and take such securities or assurances for the payment thereof as they or he shall in their or his discretion think fit: and my mind and will is, that the said John and Edward Yates, and the survivor of them, and the executors, administrators, and assigns of such survivor, do and shall, by, with, and out of the money so raised by the ways and means last hereinbefore mentioned, satisfy and discharge all such debts as shall be due and owing by me to any person or persons whomsoever, by specialty, simple contract, or otherwise howsoever, at the time of my decease, and the interest of such of the said debts as shall carry interest, with full power to admit such evidence of any debt or debts as to him or them shall seem sufficient; and in the next place, do and shall satisfy and discharge the several legacies and bequests of this my will, or which I shall or may give or bequeath by any codicils thereto. [Here insert the legacies and bequests.] In witness, &c.

GEORGE YOUNG.

Signed, sealed, published, &c.

Introductory Part of a Will or other Testamentary Appointment by a Feme Covert.

THIS is the last will and testament, or writing in nature of the last will and testament, of Mary Baker, the wife of John Baker, of being or intended to be also an appointment made pursuant to and by force and virtue, and in exercise and execution of the power and authority as me

for this purpose given in and by certain indentures of lease and release bearing date respectively the ninth and tenth days of May, 1802, the release being of four parts, and made or expressed to be made between John Baker the elder of the first part, the said John Baker my husband of the second part, of me the said Mary Baker of the third part, and James Hill of the fourth part, and every other power and authority whatsoever, enabling me in this behalf, do by this writing, signed and sealed by me in the presence of three credible witnesses, whose names are, or are intended to be written and indorsed hereon as witnesses to my having signed and sealed the same, and which writing I hereby declare to be and contain my last will and testament, limit, direct, and appoint, that all that and those my messuages and tenements, lands, and hereditaments, hereinafter particularly mentioned and described, that is to say, [*here describe the estates*] shall, from and immediately after my decease, go, continue, and be unto James and Alexander Ingold, both of Esqrs. and their heirs, to and for the several uses, estates, intents, and purposes hereinafter limited, expressed, and declared, concerning the same; that is to say, to the use and behoof, &c. [*as in a will.*]

Form of a Codicil.

WHEREAS I, Richard Roe, of Fleet Street, London, linen-draper, have made and duly executed my last will and testament in writing, bearing date the 10th day of March, 1803; now I do hereby declare this present writing to be a codicil to my said will, and I do direct the same to be annexed thereto, and to be taken as a part thereof. And I do hereby give and bequeath to my son, Richard Roe, in my said will named, the further sum of 200*l.* in addition to what I have given him in my said will. And whereas I did in and by my said will give and bequeath unto John Fenn the sum of 100*l.*; now I do hereby revoke the said legacy, and do give unto him, the said John Fenn, the sum of 10*l.* and no more. And I do hereby ratify and confirm my said will in all the other particulars thereof. In witness whereof I the said Richard Roe have to this codicil set my hand and seal, this 16th day of August, in the year of our Lord, 1820.

Signed, sealed, published, and declared
by the said testator, Richard Roe, as
and for a codicil to be annexed to his
last will and testament, and to be
taken as part thereof, in the pre-
sence of us

RICHARD ROE.

[Place of
the seal.]

[*Two Witnesses.*]

[If any real estate is disposed of by the codicil, it must, as well as a will, be attested by THREE witnesses.]

Form of a Codicil, where several Legacies are revoked.

WHEREAS I, A. B. of Richmond, in the county of Surry, gentleman, have by my last will and testament in writing, duly executed, bearing date the 6th day of September, 1820, given and bequeathed, &c. Now I the said A. B. being desirous of altering my said will in respect to the said legacies, do therefore make this present writing, which I will and direct to be annexed as a codicil to my said will, and taken as part thereof; and I do hereby revoke the said legacies by my said will given to and I do give to each of them the sum of and to the sum of only: and I give unto, &c. And I do ratify and confirm my said will in every thing, except where the same is hereby revoked and altered as aforesaid. In witness whereof, &c.

A Codicil to devise Lands purchased since the Testator's Will to the Uses of such Will, to add a new Trustee thereof, and appoint Guardians to his Children.

WHEREAS I, G. M. of _____ have by my last will and testament, bearing date the 17th day of April, 1820, given and devised all my lands and hereditaments situated in the county of Middlesex, unto C. P. and L. S. their heirs and assigns, upon such trusts, intents, and purposes, as are therein declared concerning the same. And whereas, since the making and publishing this my said will, I have purchased certain other messuages, lands, and hereditaments, situated in or near Ealing, in the said county of Middlesex. Now I do hereby give and devise all the said lands and hereditaments situated at or near Ealing aforesaid, which I have purchased since the execution of my said will, as also the messuages, lands, and hereditaments, in my said will heretofore given and devised as aforesaid, unto and for the use of the said C. P. and L. S. and unto H. R. of _____ their heirs and assigns for ever; upon such trusts, nevertheless, and to and for such ends, intents, and purposes, as in and by my said will are expressed and declared of and concerning the said messuages, lands, and hereditaments, thereby devised unto the said C. P. and L. S. their heirs and assigns as before mentioned. And I do hereby also appoint the said H. R. one of the executors of my said will, together with the said C. P. and L. S. already thereby appointed executors thereof. And I do also appoint them the said C. P. L. S. and H. R. guardians of the persons and estates, rights and interests, of my said three children, James, George, and Mary, until they shall severally attain their respective ages of twenty-one years. And I do hereby declare this present writing to be by me intended to be a codicil to my said last will and testament; and the same shall be deemed and taken as part thereof, as fully and effectually, to all intents and purposes, as if the contents thereof had been actually inserted and comprised in the said will. In witness whereof, &c.

Signed, sealed, published, &c.

G. M.

[Although by a Codicil any bequests or dispositions of a will may be altered, new legacies given, and other executors appointed in the room of those named in the will; yet where the alteration is of considerable importance, it is much better to make a new will, which is always less liable to suspicion or misrepresentation.]

A Nuncupative Will.

THE following is the last will and testament of A. B. late of _____ in the county of _____ gentleman, declared to us, whose names are hereunto subscribed, desiring it might be considered and taken as his last will and testament, and requesting that we would bear witness thereto. [Here insert the words of the testator.]

C. F.

G. L.

T. P.

A Confirmation of a Will, indorsed on the back thereof.

WHEREAS, since the making of my last will and testament, as within mentioned, I have taken to myself a wife, by which the same or part thereof might be deemed void in law; now I do, notwithstanding the said circumstance, in all respects confirm and re-establish my aforesaid will, and desire the same may still be deemed and taken to be my last will and testament. As witness my hand and seal this _____ day of _____

Signed, sealed, published, &c.

L. P.

J. C.

L. S.

M. G.

The Form of an Inventory to be exhibited to the Ordinary by the Executor or Administrator of the Goods and Personal Estate of the deceased, pursuant to the Oath and Bond entered into at the time of obtaining Probate or Administration.

A TRUE and perfect Inventory of all and every the goods, chattels, wares, and merchandizes, as well moveable as not, debts, credits, and other personal estate and effects of William Dawson, late of the parish of _____ in the county of _____ in the diocese of _____ gentleman, deceased, made by us whose names are hereunto subscribed, the tenth day of October, in the year of our Lord one thousand eight hundred and twenty.

	£.	s.	d.
Money in the house, the property of the deceased	80	0	0
400 <i>l.</i> 3 per cent. Consolidated Bank Annuities, in the books of the Bank of England, in the name of the said deceased, at 75 <i>l.</i>	231	10	0
Money on mortgage to John Woollet of Reading	260	0	0
3 Horses and harness	65	0	0
Horned cattle, <i>viz.</i> 5 cows and 3 oxen	75	0	0
30 Sheep, at per average, 1 <i>l.</i>	30	0	0
3 Swine ditto 1 <i>l.</i> 10 <i>s.</i>	4	10	0
Poultry	3	0	0
Corn growing at the time of his death	95	0	0
Corn and hay in barns and outhouses	30	0	0
Ploughs, cart, waggons, and other implements of husbandry	46	0	0
Wearing apparel	16	0	0
Plate	12	0	0
Household goods and furniture	150	0	0
Books	6	0	0
Lease for 21 years, from Lady-day, 1809, of the testator's house of residence	75	0	0
Rent in arrear due to the deceased at the time of his death, from the tenants of sundry houses, situate, &c. (<i>describing them</i>)	63	10	0
Other debts due to the deceased, supposed to be recoverable	179	18	0
	£ 1422	8	0
Debts due to the deceased, but supposed to be irrecoverable	98	11	0
Debts owing by the deceased at the time of his death	113	10	0

Taken and appraised by us, the year and day first above written.

JAMES HOGG, } of
THOMAS GILL, } sworn appraisers.

[The inventory, pursuant to several acts of parliament, must be written upon stamped paper or parchment.]

FORMS OF ARTICLES OF COPARTNERSHIP, &c.

Articles of Co-Partnership for carrying on a Joint Trade.

ARTICLES of agreement indented, &c. between A. B. of _____ of the one part, and C. D. of _____ of the other part
First, The said A. B. and C. D. have joined, and by these presents do

join themselves, to be co-partners together in the art or trade of and all things thereto belonging; and also in buying, selling, vending, and retailing all sorts of wares, goods, and commodities, belonging to the said trade of which said co-partnership is to continue from for and during and unto the full end and term of from thence next ensuing, and fully to be complete and ended. And to that end and purpose he the said A.B. hath, the day of the date of these presents, delivered in as stock the and the said C.D. the sum of to be used, laid out, and employed in common between them, for the management of the said trade of to their mutual benefit and advantage. And it is agreed between them the said parties to these presents, and the said co-partners each for himself respectively, and for his own particular part, and for his executors and administrators, doth severally and not jointly covenant, promise, and agree, to and with the other partner, his executors and administrators, by these presents, in manner and form following; that is to say: That they the said co-partners shall not, nor will, at any time hereafter, use, exercise, or follow the trade of aforesaid, or any other trade whatsoever, during the said term, to their private benefit or advantage, but shall and will from time to time, and at all times during the said term (if they shall so long live), do their and each of their best endeavours in and by all means possible, to the utmost of their skill, power, and cunning, for their joint interest, profit, benefit, and advantage, and truly employ, buy, sell, and merchandise with the stock aforesaid, and the increase thereof, in the trade of aforesaid, without any sinister intentions or fraudulent endeavours whatsoever. And also that they the said co-partners shall and will from time to time, and at all times hereafter during the said term, pay, bear, and discharge equally between them the rent of the shop which they the said co-partners shall rent or hire for the joint exercising or managing the trade aforesaid. And that all such gain, profit, and increase, that shall come, grow, or arise, for or by reason of the said trade, and joint occupying as aforesaid, shall be from time to time during the said term equally and proportionably divided between them the said co-partners, share and share alike. And also that all such loss as shall happen to the said joint trade by bad debts, ill commodities, or otherwise, without fraud or covin, shall be paid and borne equally and proportionably between them. And further it is agreed by and between the said co-partners, parties to these presents, that there shall be had and kept from time to time, and at all times during the said term, and joint occupying and co-partnership together as aforesaid, perfect, just, and true books of account, wherein each of the said co-partners shall duly enter and set down, as well all money by them received, paid, expended, and laid out in and about the management of the said trade, as also all wares, goods, commodities, and merchandises, by them or either of them bought and sold, by reason, or means, or upon account of the said co-partnership, and all other matters and things whatsoever, to the said joint trade, and the management thereof, in any wise belonging or appertaining; which said books shall be used in common between the said co-partners, so that either of them may have access thereto without any interruption of the other. And also that they the said co-partners, once in three months, or oftener if need shall require, upon the reasonable request of one of them, shall make, yield, and render each to the other, or to the executors of each other, a true, just, and perfect account, of all profits and increase by them or either of them made; and of all losses by them or either of them sustained; and also of all payments, receipts, disbursements, and all other things whatsoever by them made, received, disbursed, acted, done, or suffered, in their said co-partnership and joint occupying as aforesaid; and, the same accounts so made, shall and will clear, adjust, pay, and deliver each unto the other at the time of making such account their equal

shares of the profits so made as aforesaid. And at the end of the term of or other sooner determination of these presents (be it by the death of one of the said co-partners, or otherwise), they the said co-partners each to the other, or, in case of the death of either of them, the surviving party, to the executors or administrators of the party deceased, shall and will make a true, just, and final account of all things as aforesaid, and divide the profits aforesaid, and in all things well and truly adjust the same; and that then also, upon the making of such a final account, all and every the stock and stocks, as well as the gains and increase thereof, which shall appear to be remaining, whether consisting of money, wares, debts, &c. shall be equally divided between them the said co-partners, their executors, or administrators, share and share alike. In witness, &c.

A Deed of Dissolution of a Partnership.

THIS indenture made, &c. between A. B. of of the one part, and C. D. of of the other part. Whereas, &c. [*Reciting the articles of co-partnership.*] and whereas the said A. B. and C. D. have mutually agreed, and do hereby mutually agree, to determine and dissolve the said co-partnership, and the same is by these presents absolutely determined and dissolved, in manner as hereinafter is mentioned: the said C. D. for and in consideration of the covenant and agreement hereinafter contained, on the part and behalf of the said A. B. his heirs, executors, and administrators, to be done and performed, doth hereby covenant, promise, and agree, to and with the said A. B. his executors and administrators, that he the said A. B. his heirs, administrators, and assigns, shall from henceforth be entitled to have, receive, and take all and every the messuages, lands, tenements, hereditaments, and premises, with the appurtenances, and all and every the stock in trade, cash, debts, sum and sums of money, goods, chattels, estate, and effects whatsoever, wheresoever, and of what nature and kind soever, against him the said C. D. his executors and administrators, to and for the absolute use and behoof of the said A. B. his heirs, executors, administrators, and assigns, subject, nevertheless, to the debts due and owing from and by the said co-partnership between the said A. B. and the said C. D. and also at the expense of him the said A. B. his executors and administrators, the name of him the said C. D. shall at all times hereafter be made use of for the recovery of all or any part of the co-partnership debt and stock in trade, with the interest and increase thereof, subject as aforesaid to the absolute use and behoof of the said A. B. his executors, administrators, and assigns, as by his or their counsel learned in the law shall be advised. And also that the said C. D. his executors and administrators shall and will, at all and every time and times hereafter, upon the request and at the costs of the said A. B. his executors and administrators, both in and out of any court of law or equity, do all and every such act and acts as by the said A. B. his executors and administrators, or any of their counsel learned in the law, shall be reasonably advised and required for fulfilling and accomplishing these presents. And the said A. B. for and in consideration of the covenant and agreement herein contained, on the part and behalf of the said C. D. his executors and administrators, to be observed and performed, doth hereby covenant and agree to and with the said C. D. his executors and administrators, in manner and form following; that is to say: that he the said A. B. his executors and administrators, shall and will, on request, seal, deliver, and execute, to the said C. D. his executors, administrators, and assigns, one bond or obligation in the penal sum of pounds, with a condition to be therein inserted for payment to the said C. D. his executors, administrators, and assigns, of all and every sum and sums of money, as any two persons, to be indifferently named by them the

said A. B. and C. D. conversable and acquainted with the business of the trade, shall, by their award in writing, under their hands and seals, and at the time and place therein for that purpose to be mentioned, award, order, and direct, to be paid by the said A. B. his executors or administrators, to the said C. D. his executors, administrators, and assigns. And if such arbitrators shall not make such their award in writing within one month from the time of such nomination, that then the said arbitrators shall, within the space of six days after the expiration of the said one month, elect, nominate, and appoint a third person by way of umpire for the purpose aforesaid, and which said umpire shall, within fifteen days after he shall be so nominated and appointed, make and deliver award or umpirage in writing, under his hand and seal, of and concerning all and every such sum and sums of money as he shall therein direct to be paid by the said A. B. his executors, administrators, and assigns; and the said award or umpirage, when so made, shall be duly observed, kept, and performed by the said parties hereto, their executors and administrators, according to the true intent and meaning thereof: and further, that they the said parties hereto, and each of them, both in and out of any court or courts of law or equity, respecting the measures aforesaid, and at the costs and charges of the said A. B. shall and will do all and every act and acts as by their or either of their counsel shall be advised and required for the fulfilling and accomplishing of these presents. In witness, &c.

FORMS OF BONDS, &c. &c.

Bond for Payment of Money by Instalments.

Know all men by these presents, that we, D. I. the younger, of in the county of Esq. P. W. of in the said county, and L. M. of in the county of widow, are held and firmly bound to D. I. the elder, of aforesaid, in the sum of of good and lawful money of Great Britain, to be paid to the said D. I. the elder, or his certain attorney, executors, administrators, or assigns; for which payment, well and truly to be made, we bind ourselves, and each of us binds himself, our heirs, executors, and administrators, of each of us, firmly by these presents, sealed with our seals, dated this day of in the year of our Lord

Whereas the above-named D. I. the elder, and D. I. the younger, have hitherto carried on the business of stockbrokers in co-partnership: and whereas the said D. I. the elder is about to retire from business, and assign over his share, property, and effects therein, unto the said D. I. the younger, which has accordingly been done by indenture, bearing even date with the above-written obligation; in consideration whereof the said D. I. the younger has agreed to pay, and secure to be paid, unto the said D. I. the elder, the sum of in such manner as in the same indenture is expressed, and the further sum of (making in all the sum of) by the above-written obligation. Now the condition of the above-written obligation is such, that if the above-named D. I. the younger, P. W. and L. M. or any or either of them, their heirs, executors, or administrators, or the heirs, executors, or administrators of any or either of them, or some or one of them, do and shall well and truly pay, or cause to be paid, unto the above-named D. I. the elder, his executors, administrators, or assigns, the full sum of of lawful money of Great Britain with interest for the same, after the rate, days, place, and times, and in the manner following; that is to say, the sum of

part hereof on or before the day of which will be in the year of our Lord together with the interest for the same sum of after the rate of for every by the year, in the mean time by equally quarterly payments, on the day of the day of the day of and the day of in each succeeding year: and the further sum of of like lawful money, the remaining part of the said sum of on the day of which will be in the year of our Lord together with interest for the same, after the rate, and in the days aforesaid, in the said year, (all which payments are to be made at in the county of between the hours of twelve and two o'clock in the afternoon), the above-written obligation shall be void; but if default shall at any time be made in payment of all, either, or any part of the said principal sums of and or of the interest for the same, or for either of them, or any part of the said interest, at any or either of the days and times above-mentioned, for payment thereof respectively, then the said obligation shall remain and be in full force and effect.

Condition to Trustees, in consideration of a Marriage and Marriage-Portion, to leave the Wife and her Issue a competent Fortune.

THE condition of this obligation is such, that whereas a marriage is intended to be shortly had and solemnized between the above bounden B. D. and E. F. spinster, daughter of G. H. of with whom the said B. D. is to receive as a marriage-portion the sum of to be applied in manner herein-after mentioned: if therefore the said marriage shall take effect, and the said B. D. shall die in the life-time of the said E. F. then if the heirs, executors, or administrators of him the said B. D. do and shall, within six months after his death, pay or cause to be paid into the hands of the above-named M. N. O. O. and R. S. the sum of to be by them applied upon the trusts and for the ends and purposes following; that is to say: That the said Trustees, and the survivors and survivor of them, shall pay pounds, parcel of the said pounds, to the said E. F. for her sole use and benefit; and in case the said B. D. shall leave any child or children of his body on the body of the said E. F. begotten, which shall live to be married or attain the age of twenty-one years, the said trustees shall pay pounds residue of the said pounds, to such child or children equally among them, share and share alike, as and when they shall severally be married, or attain the age of twenty-one years respectively, and the interest thereof in the mean time to be applied for their maintenance. And in case the said B. D. shall leave no issue of his body on the body of the said E. F. begotten, or leaving issue, and such issue shall all happen to die before their marriage or age of twenty-one years, then the said last-mentioned sum of pounds to be likewise paid to the said E. F. her executors and administrators; then, &c. or else, &c.

A general Letter of Attorney to receive Debts.

KNOW all men by these presents, that I, C. D. of have made, ordained, authorized, constituted, and appointed, and by these presents do make, ordain, authorize, constitute, and appoint, R. S. of my true and lawful attorney, for me and in my name, and to my use (or, but to the use of him the said R.S.) to ask, demand, sue for, recover, and receive of T. B. of all such sum and sums of money, debts, and demands whatsoever, which now are due or owing unto me the said C. D. by and from the said T. V. and, in default of payment thereof, to

Bill of Sale of Goods and Chattels.

Know all men by these presents, that I, G. H. of _____ in consideration of the sum of _____ to me in hand paid by P. N. of _____ at and before the sealing and delivery of these presents, the receipt whereof I do hereby acknowledge, have bargained, sold, released, granted, and confirmed, and by these presents do bargain, sell, release, grant, and confirm unto the said P. N. all the goods, household stuff, and implements of household, and all other goods and chattels whatsoever, mentioned and expressed in the schedule hereunto annexed, now remaining and being in _____ to have and to hold all and singular the said goods, household-stuff, and implements of household, and every of them, by these presents bargained, sold, released, granted, and confirmed unto the said P. N. to the only proper use and behoof of the said P. N. his executors, administrators, and assigns, for ever. And I the said G. H. for myself, my executors and administrators, all and singular the said goods and household-stuff unto the said P. N. his executors, administrators, and assigns, against me the said G. H. my executors, administrators, and assigns, and against all and every other person or persons whatsoever, shall and will warrant, and for ever defend, by these presents; of which goods, household-stuff, and implements of household, I the said P. N. have put the said G. H. in full possession by delivering to him one silver cup in the name of all the said goods and chattels, at the sealing and delivery thereof. In witness, &c.

INDEX.

- A**
ABATEMENT of freehold, 49
Abduction, 24, 210
Accessary, 134
Acts of Parliament, 9
Administrator, 388
Admiralty, Court of, 130
Advertising for stolen goods, 165
Adultery, 24
Advowson, 463
Affray, 171
Agreements, 44—forms of, 661 to 665
Agents, 460
Aliens, 289
Alimony, 579
Ambassadors, rights of, 144
Animals, cruelty to, 233
Annuities, 469
Apostacy, 136
Appeal, 105
Appendix, 657
Apprentices, 372
Approvers, 163
Arbitration, 626—between Masters and Workmen, 617
Archbishop, 299
Arches, Court of, 128
Archdeacon, 301
Arraignment, 251
Arrest, 81, 241—of judgment, 102
Arson, 212
Artificers, seducing, 180
Assault, 11
Assignment, 425—of estate, 519—of a lease, form of, 660
Assize, Court of, 124
Assumpsits, 45,—*quantum talebat*, ib.—money had and received, 16
Attachment, writ of, 78
Attainder, 263—writ of, 105
Attorney at law, action against, 47
Attorney-general, information by, 249
Auctioneers, 440
Award, 626
Bailiffs, 310
Bail, 82, 244
Bailment, 556
Bank Notes, 580
Bankers' Notes, 580
Bankruptcy, 581 to 617.—fraudulent, 174
Bastard, 143, 383
Battery, 12
Beadles, 367
Benefit Societies, 638
Bigamy, 184
Bill of sale, form of, 684
Bills of exchange, 556 to 578
Bishop, 299
Black Act, 169
Blasphemy, 141
Bond, 519—forms of, 682
Borough-English, 6
Bribery, 167
Burgage tenure, 471
Burglary, 212
Butter and Cheese, 453
Capias, 78
Capias ad satisfaciendum, writ of, 108
Carrier, 428
Case, action on the, 75
Cattle, 456
Challenges of Jury, 256
Challenges to fight, 173
Champerty, 166
Chancery, process of a suit in, 111—court of, 118
Chancellor, Lord, 120
Cheating, 177
Chivalry, court of, 129
Churchwardens, 312
Civil injuries, 11
Clergy, 298—benefit of, 259
Codicils, 539—forms of, 677
Coin, 149, 152
Commissioners of sewers, court of, 130
Commitment, 243
Common, 466—of piscary, 467—of estovers, 467
Common law, 5
Common barratry, 165
Common Pleas, Court of, 122
Commons, House of, 272
Composition for Tithes, 464
Compounding offences and prosecutions, 166
Confirmation of lands, 518
Conjuration, 142
Consanguinity, 505
Conspiracy, 166
Constable, 348
Contempt, 160
Contracts, 550—by sale or exchange, 552
Conversion, action of, 38
Conveyances, 510
Copyholds, 472, 488
Corn, 456
Corporations, 369
Corrody, 467
Coroner, 311
Corruption of blood, 264
Costs, 105
Covenants, 40, 421
County court, 125
Courts of law, 118
Court leet, 126

- Court baron, 127
 Courts ecclesiastical, 128—military, 129
 —maritime, 129—of a special jurisdiction, *ib.*
 Criminal conversation, 24
 Crimes, 132
 Curate, 307
 Cursing, 141
 Customs, 6 to 8

 Dean, 300
 Debt, 39
 Deceit, writ of, 106—action of, 48
 Deed, 510
 Defamation, 16
 Defeazance, 519, 521
 Deforcement, 50
 Delegates, court of, 129
 Demurrer, 91
 Denizen, 289
 Descent of lands, 52—law of, 505
 Desertion, 155
 Detinue, action of, 36
 Devise, and Devisee, 521
 Dignities, 467
 Discontinuance, 50
 Disorderly houses, 188
 Disseisin, 50
 Dissenters, 137
 Distress for rent, 28—practical directions for making, 667
 Disturbance of franchises, 70—of common, 71—of ways, *ib.*—of tenure, 72
 of patronage, *ib.*—of religious assemblies, 137
 Dower, 482
 Drunkenness, 143
 Dwelling-house, robbing of, 230—stealing in, 231

 Ecclesiastical courts, 128
 Eave-droppers, 241
 Ejectment, 54
 Elopement, 380
 Elegit, writ of, 109
 Embezzling king's stores, 155
 Embracery, 168
 Engrossing, 178
 Entry, 52
 Equity of redemption, 492
 Error, writ of, 106, 265
 Escape, 163
 Estate, in tail, 476—for life, 479—for years, 486—at will, 487—at sufferance, 488—upon condition, 490—by elegit, 494—in remainder and reversion, 494 to 500—in severalty, 500—in joint tenancy, 501—in coparcenary, 503—in common, *ib.*
 Estrepement, writ of, 68
 Evidence, 96, 257
 Exchanges, 517
 Exchequer, court of, 122
 Exchequer Chamber, court of, 123
 Execution, 268—process of, 106
 Executor, 388
 Executory devise, 498
 Extortion, 168

 False imprisonment, 19
 False news, 172
 Factors, 460
 Farmers, 453
 Fee, 473
 Felons, rewards for prosecuting of, 228
 Felony, 152—compounding, 165—against the king's council, 154—misprison of, 160
 Felo de Se, 204
 Feoffment, 514
 Fieri facias, writ of, 109
 Fines, of copyhold, 472
 Fireworks, 188
 Forcible entry, 172
 Foreign states, serving of, 154
 Forestalling, 178
 Forfeiture, 263
 Forgery, 237
Forma pauperis, 105
 Fortune-tellers, 185
 Franchises, 467
 Freehold estates, 473, 479

 Game Laws, 191
 Gaming, 189
 Gaplers, 163, 310
 Gavelkind, 6
 General issue, 86
 Gifts, 514
 Gleaning, 457
 God and religion, offences against, 138
 Goods, bill of sale of, 684
 Grants, 515
 Guardian and ward, 385
 Gypsies, 185

Habeas Corpus, 20
 Hanging, 268
 Health, offences against the public, 180
 Heir apparent, 506—presumptive, *ib.*
 Heiress, stealing of an, 210
 Hereditaments, 462
 Heriots, 472
 Heresy, 136
 High treason, 146
 Homicide, 202
 House, lease of, 657
 Housebreaking, 231
 Hunting, unlawful, 170
 Husband and wife, 378

 Idleness, 185
 Ignorance, 133
 Impostures, religious, 142
 Inclosures, destroying, 214
 Incorporeal hereditaments, 463
 Indictment, 245—process upon, 250
 Induction to a benefice, 304

Infant, 400
 Information, 249
 Innkeepers, 432
 Inquiry, writ of, 104
 Insolvent Debtors, 647—court of, 125
 Intrusion, 49
 Issue, 90
 Jointure, 485
 Judgment, 101, 262—interlocutory, 103
 —final, 104—reversal of, 264
 Jury, trial by, 91—challenges of, 94
 Justices of the peace, 311
 Kidnapping, 211
 Kindred, collateral, 506
 King, 279—his prerogative and attri-
 butes, 282—his revenue, 285—his
 councils, 281
 King's Bench, court of, 121
 Lands, 461
 Landlord and Tenant, 410
 Larceny, 214—compound, 225
 Latitat, writ of, 80
 Law of England, 5 to 10
 Lead, stealing, 228
 Lease 515—form of, 657
 Legacies, 541 to 550
 Legatees, 542
 Letter, threatening, 171
 Letter of Attorney, form of, 683
Levari facias, writ of, 109
 Lewdness, 143
 Libel, 15
 Liens, 635
 Limitations, statute of, 87
 Linen, stealing from place of manufac-
 ture, 224
 Liturgy, reviling of, 136
 Locks on rivers, destroying of, 171
 London, customs of, 7
 Lords, House of, 271
 Lord Mayor's court, 130
 Maiming cattle, 232
 Maintenance, 166
 Malicious mischief, 231
 Manslaughter, 205
 Manufacturers, seducing them abroad,
 179
 Mariners, wandering, 187
 Maritime courts, 129
 Marriage, clandestine, 183
 Marshalsea Court, 130
 Master and Servant, 372
 Masters and Workmen, 617
 Mayhem, 12, 209
 Memory, time of, 7
 Merchant statute, 493
 Middlesex, a bill of, 79
 Military courts, 129
 Mischief, 231
 Misdemeanor, 132, 160
 Misprision, 159

Modus decimandi, 465—*non decimandi*,
 466
 Monopolies, 177
 Mortgages, 491
 Murder, 206
 Naturalization, 298
 News, spreading false, 172
 Nightwalkers, 241
Nisi Prius, 124
 Non-conformity, 136
 Notices to quit, form of, 665
 Nuncupative will, 522—form of, 678
 Nuisance, 63, 187
 Oaths, administering unlawful, 155
 Obstructing process, 163
 Offences public, 132
 Offices, 467
 Officers, killing them in executing their
 office, 207
 Orchards, robbing, 223
 Ordinances of the church, reviling of,
 136
 Original writ, 75
 Overseers of the poor, 321
 Ouster of freehold and chattels, 49
 Owling, 173
 Palace court, 130
 Parish settlements, 338
 Parliament, 269
 Papists, 148
 Pardon, 267
 Parent and child, 382
 Parish clerks, 366—officers, 312
 Parochial affairs, 312 to 338
 Parson, 301
 Partition, deed of, 517
 Partners, 405
 Partnership, form of articles of, 679—
 dissolution of, 681
 Passports, violation of, 144
 Pawnbrokers, 443
 Peculiars, court of, 128
 Perjury, 167
 Petitioning, tumultuous, 171
 Pie-Poudre, court of, 127
 Piracy, 144
 Piscary, common of, 467
 Pleadings, 83
 Pleas, 85
 Plea and issue, 253
 Police, offences against, 155
 Pound, 32
 Præmunire, 156
 Prerogative court, 129
 Presentment, 245
 Primogeniture, 507
 Process in an action, 77—upon an indict-
 ment, 230—obstructing of lawful, 168
 Principals, 133
 Privy council, offences against, 154
 Profaneness, 142

- Promise, 42—the statute of frauds in respect of a, 43
 Promissory notes, 578
 Prophecies, false, 172
 Prosecution, malicious, 18—the several modes of, 244
 Provisions, selling unwholesome, 182
 Public peace, offences against, 168
 Public officers, 309
 Purchase, 505
 Qualification for killing game, 191
Quantum valebat, 45
Quare impedit, 72
Quo minus, writ of, 80
Que warrento, 371
 Quarantine, 181
 Rape, 211
 Records, embezzling, 162
 Recognizances, 239, 520
 Regrating, 178
 Release of lands, 517
 Remainder, estates in, 494 to 500
 Rent, double, 418
 Rents, 470
 Replevin, 34
 Reprieve, 265
 Requests, court of, 130
 Rescue, 163
 Reversal of judgment, 264
 Review, commission of, 129
 Rewards for apprehending felons, 228
 Riding, or going, armed, 172
 Riots, 168
 Riotous assemblies, 171
 Rivers, destroying banks of, 234
 Robbery, 225
 Roman Catholics, 138
 Royal assent, 277
 Royal Family, 279
 Sabbath-breaking, 142
 Sale or exchange, 552
Scandalum magnatum, 13
 Sea, destroying banks of, 234
 Seditious meetings, 169
 Seduction, 26
 Seducing artificers out of the kingdom, 180
 Self-murder, 204
 Servants employed in husbandry, 458
 Sexton, 367
 Sheep-stealing and killing, 224
 Sheriff, 309
 Sheriff's court, 130
 Simony, 142
 Stander, 13
 Sluices on rivers, destroying, 171
 Smuggling, 174
 Soldiers, seducing of, 155
 Sockage, 471
 Sodomy, 211
 Special pleas, 87
 Stage coachmen, punishment of, 236
 Statutes, 9
 Statute of frauds, 42
 Statute staple and merchant, 493
 Stolen goods, receiving of, 164
 Stores, embezzling or destroying, 155
 Subornation of perjury, 167
 Subtraction of rents and services, and remedies therein, 69
 Surrender, deed of, 518
 Surveyors of highways, 367
 Swearing, 141
 Tenures, 471
 Tenement, 461
 Terms, 77
 Testament, 521
 Theft, 215
 Theft-bote, 165
 Threatening letters, 171
 Threats, 11
 Timber trees, 221
 Tithes, 463
 Trade, offences against, 173
 Transportation, returning from, 164
 Treason, high, 146—petit, 208—misprision of, 159
 Trespass *vi et armis*, 58
 Trustees, 404
 Trover and conversion, 38
 Trial, 255
 Turnpikes, destroying, 171
 Turning king's evidence, 252
 Vagabonds and vagrants, 185
 Verdict of a jury, 100
 Vestry Clerk, 367
 Vicar, 301
 Vice-chancellor's court, 120
 Underwood, destroying, 221
 Usury, 174
 Wardship, 472
 Warning, 415
 Waste, 66
 Watchmen, 366
 Ways, 467
 Whoremongers, 241
 Wills or testaments, 521—who are capable of making, 524—what may be disposed of by, 527—who are capable of taking by, 533—execution of, 534—forms of, 672
 Witnesses, 97
 Witchcraft, 142
 Wounding, 12
 Wrecks, 286
 Writ, original, 75

SUPPLEMENT
TO
GIFFORD'S
ENGLISH LAWYER;

CONTAINING
THE FOLLOWING STATUTES,

NOT NOTICED IN THE WORK:

Of Damages committed by Riotous and Tumultuous Assemblies.		Amendment of the Acts for the Relief of Insolvent Debtors.
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ALSO,

THE LAWS OF INSURANCE;
THE EXCISE AND CUSTOMS' LAWS;
THE ASSESSED TAXES;
STAMP DUTIES, &c.

By JOHN GIFFORD, Esq.



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CONTENTS.

	PAGE		PAGE
Damages by Riots	1	Outward Entry	77
Amendment of Insolvent Debtors' Act..	3	Inward Entry	78
LAW OF INSURANCES.		Powers of Officers.....\.....	80
OF MARINE INSURANCES.	13	Manifests.....	—
The Policy	—	Duties	82
Warranties	16	Delivering Cockets for Goods Ex-	
Re-Assurances and Double Assu-		ported	85
rances.....	19	Drawback, Bounty, or Premium...	—
Losses upon Policies of Insurance	—	Goods Coastwise	86
General Average	23	Bonds	89
Partial Loss, and Adjustment...	25	Seizures	90
Salvage, and Abandonment.....	27	Penalties and Forfeitures	—
Direct Fraud in Policies	29	Ships' Registry	91
Changing the Ship.....	30	Ships' Crews	93
Deviation in the Voyage	31	Drawback on Exportation—	
Sea-Worthiness	32	Packing	95
Wager Policies	33	Shipping	96
Valued Policies	35	Bond for due Exportation.....	97
Illegal Voyages	—	Debenture and Payment of	
Prohibited Goods and Commerce	36	Drawback	98
Return of Premium	—	Warehousing :.....	100 to 113
OF BOTTOMRY & RESPONDENTIA	37	ASSESSED TAXES.	
OF INSURANCE UPON LIVES	40	New Window Duty	114
OF INSURANCE AGAINST FIRE ...	42	New House Duty	117
LAWS OF EXCISE.		Male Servants.....	119
Head Office.....	45	Dogs.....	121
Legal Entry	46	Horses	—
Officers	47	Carriages	122
Securities.....	49	Taxed Carts	123
Sale of Offices	—	Horse-Dealers.....	124
Seizures	50	Coach-Makers.....	—
Obstructing Officers	51	Hair Powder	—
Fees, Bribes, and Collusive Seizures	—	Armorial Bearings.....	125
Permits and Certificates	52	Game	—
Prosecutions	55	Composition for the Assessed Taxes	—
Appeals	60	STAMP DUTIES.	
Fines, Penalties, & Forfeitures.....	61	Receipts	129
Excise Licences	68	Promissory Notes	—
LAWS OF CUSTOMS.		Bills of Exchange	130
Hours and Places for shipping		Stamps of all other Denominations	131
Goods.....	76		

SUPPLEMENT.

Damages committed by Riotous and Tumultuous Assemblies.

By the 3 Geo. IV. c. 33. for the more speedy recovery of small damages committed by riotous assemblies, &c. it is enacted, that it shall not be lawful for any person or persons whomsoever in England, where the loss, injury, or damage claimed and alleged to have been sustained shall not exceed the sum of 30*l.* to commence, bring, or prosecute any action or actions at law for or on account of the loss, injury, or damage sustained by the demolishing, pulling down, destroying, or damaging, wholly or in part, of any church, chapel, or any building for religious worship duly certified and registered, or any dwelling-house, barn, stable, or out-house, by any persons unlawfully, riotously, and tumultuously assembled; or for or on account of any loss, injury, or damage sustained by the demolishing or pulling down, wholly or in part, of any wind saw-mill, or other wind-mill, or any water-mill or other mill, or any of the works thereunto belonging, by any persons unlawfully, riotously, and tumultuously assembled; or for or on account of the loss, injury, or damage sustained by the unlawfully and with force demolishing or pulling down, or beginning to demolish or pull down any erection and building, or engine used or employed in carrying on or conducting of any trade or manufactory, or any branch or department of any trade or manufactory of goods, wares, or merchandizes of any kind or description whatsoever, in which any wares, goods, or merchandize shall be warehoused or deposited, by any person or persons unlawfully, riotously, and tumultuously assembled together, to the disturbance of the public peace; or for or on account of the loss, injury, or damage sustained by the unlawfully and with force demolishing, pulling down, destroying, or damaging any fire-engine or other engine erected or to be erected for the making, sinking, or working collieries, coal-mines, or other mines, or any bridge, waggon-way, or trunk erected or made, or to be erected or made, for conveying coals or other minerals from any colliery, coal-mine, or other mine, to any place, or for shipping the same, or any staith or other erection or building for depositing coals or other minerals, or used in the management or conducting of the business of any such colliery, coal-mine, or other mine, by any person or persons unlawfully, riotously, and tumultuously assembled together, in disturbance of the public peace; or for or on account of any house, shop, or other building whatsoever, or any part thereof, being destroyed or in any manner damaged or injured, or any fixtures thereto attached, or any furniture, goods,

or commodities which shall be therein, being destroyed, taken away, or damaged, by the act or acts of any riotous or tumultuous assembly of persons, or by the act or acts of any person or persons engaged in or making part of such riotous or tumultuous assembly; or for or on account of the loss, injury, or damage sustained by the unlawfully or maliciously killing or maiming of any cattle, cutting down or destroying any trees, setting fire to any house, barn, or out-house, hovel, cock, mow, or stack of corn, straw, hay, or wood; or for or on account of the loss, injury, or damage sustained by the setting fire to or destroying any ricks or threshing machines, by the act or acts of any riotous or tumultuous assembly of persons. § 1.

And in every case aforesaid, where the loss, injury, or damage claimed or alleged to have been sustained, shall not exceed in amount the sum of 30*l*. the party or parties damnified or injured shall within one calendar month give notice in writing to the high constable of the hundred, rape, wapentake, lathe, riding, division, or liberty, or to the mayor or other chief magistrate of the city, town, or place in which such loss, injury, or damage shall have been suffered or sustained, and where there is no high constable, to the churchwardens or overseers, or to any two substantial householders not being interested, or left at their respective last or usual places of abode, of such riotous or tumultuous assembly having taken place, and the nature and amount of the loss, injury, or damage sustained, and of his, her, and their intention of calling upon the inhabitants of such city, &c. to make good such loss, injury, or damage; and the said high constable, &c. is forthwith to give notice in writing thereof to the magistrates residing in or acting for such city, &c. who shall thereupon appoint a special petty session to be holden within thirty days next after the receipt of such notice, of all the magistrates residing in or acting for such city, &c. to hear and determine of any complaint which may be then and there brought before them, for or on account of any such damage or injury; and the party or parties so damnified and injured are directed to give notice, or cause a notice in writing, in the form of a schedule annexed, to be placed on a church or chapel door or most conspicuous place of the parish in which such loss, injury, or damage shall have been sustained, on two successive Sundays next preceding the day of holding of such petty session, of the intent and purpose for which such special petty session is to be held. § 2.

In case the high constable, mayor, &c. shall neglect or refuse to give notice as directed and required, the party or parties may sue them for the amount of damages, by action of debt or on the case, in any of his majesty's courts of record at Westminster. § 3.

By section 4, the magistrates, &c. at such petty sessions are authorized to adjudicate the sum or sums of money to be paid to parties aggrieved, together with all reasonable costs and charges, and likewise to order such costs, &c. to be paid by the treasurer of the county, city, &c. (as the case may be); and such treasurer is to be allowed the same in passing his accounts.

Magistrates may issue their summons for the attendance of witnesses; who, upon being tendered their reasonable expences, must appear, under the penalty of 10*l.* or in default of payment to be imprisoned for three months in the common gaol or house of correction. § 5.

And in any action or actions hereafter to be brought in England against the inhabitants of any city, &c. for damages occasioned by riotous and tumultuous assemblies, the defendant may, with the consent and approbation of the justices of the peace, suffer judgment to go by default; but the plaintiffs shall nevertheless be required to produce the same proof before the sheriff or other officer taking the inquisition, in establishing his claim, as would be required if such actions had been defended. § 6.

Persons aggrieved may appeal to the quarter-sessions, upon giving ten days' notice to the parties appealed against, and entering into a recognizance to try such appeal. § 7.

By section 8, parties are protected from any irregularities made in enforcing by distress the recovery of any damages or penalties awarded by this act,

Section 9, contains the form of conviction.

The remaining sections relate to the recovery of damages in Scotland, having the same tendency, and granting the same facilities as the enactments we have here noticed.

Amendment of the Insolvent Debtors' Act.

By the 3 Geo. IV. c. 123. it is enacted, that it shall be lawful for the Provisional Assignee of the Court for Relief of Insolvent Debtors, to take possession of all the real and personal estate and effects of every prisoner, who shall subscribe the petition, and execute the conveyance and assignment mentioned in the 1 Geo. IV. c. 119. and, if the court shall so order, to sell or otherwise dispose of such goods, chattels, and personal estate, or any part thereof, and, if the court shall so order, of the real estate of such prisoner, according to the provisions and for the purposes of the said act, and out of the proceeds to defray, in the first place, all such expences of taking possession of and selling the same as shall be allowed by the court. § 1.

The provisional assignee may sue in his own name for the recovery of any estate, debts, effects, or rights of any such prisoner; and in case of the dismissal of the petition of such prisoner, all acts done before such dismissal shall be valid. § 2.

It shall be lawful for the court to appoint, at any time after the filing of a prisoner's petition, and *before* it shall adjudge him entitled to his discharge *as well as after* such adjudication, one or more assignee or assignees, for the purposes of the said act; which assignees shall have the same powers, authorities, rights, and duties, and shall be subject to all the duties, liabilities, and punishments given by this or the said act with respect to the provisional or other assignee or assignees; and in all cases after assignment by the pro-

visional assignee, all the estate and effects of such prisoner shall be as effectually and legally vested by relation in such assignee or assignees, as if the first assignment had been made to him or them. But no act done by virtue of such first assignment shall be thereby rendered void or defeated. § 3.

If any assignee shall wilfully retain, or employ for their own benefit, any sums of money part of the estates of such insolvent, the court shall have full power to order such assignees to be charged in their accounts with interest at a rate not exceeding 20*l. per centum per annum* on all sums of money so retained or employed by them for the time during which they shall have so retained or employed the same. § 4.

The court, or the justices acting under the authority of the said act, shall have the same power to examine into all debts in the prisoner's schedule, whether the same shall be therein stated to be *admitted or disputed*, or *admitted in part and disputed in part*, as is enacted by the said act as to the debts stated to be *admitted* therein; and shall also have power to inquire whether any of such debts have been improperly admitted or improperly disputed by the prisoner with a fraudulent intent. § 5.

In the adjudication of the court that any prisoner is entitled to the benefit of the act, and the order thereon, it shall not be necessary to specify the several creditors, as required by the said act; but it shall be sufficient, if the court shall think fit, to refer to the schedule of such prisoner as specifying such creditors as to whom the court shall adjudge the prisoner entitled to the benefit of the act, and to be discharged forthwith. And in all cases where it shall appear that any prisoner shall have done any act for which the court is authorized to order that such prisoner shall not be discharged by virtue of the said act, until he shall have been in custody at the suit of some one or more of the persons who were creditors at the time of petitioning the said court, or had since become creditors in respect of debts then growing due, and from whose claims he or she shall be discharged by the judgment of the said court, for a period or periods not exceeding three years in the whole, the court may adjudicate thereon in the words of the said act, without naming any such creditor or creditors in such adjudication; and thereupon the said insolvent shall be subject to be detained in prison by his then detaining creditor or creditors, and to be arrested or charged in custody by any of the other creditors in his schedule, until he shall have been in custody for such period or periods in the whole as shall be specified in such adjudication. § 6.

The court may order expences of reference to be paid out of the first proceeds, and the prisoner to attend, if required, in matters of reference: the fee to the keeper of the prison, or his deputy, to be ten shillings, to be paid by the parties requiring the reference: false swearing under the reference to be punished as wilful and corrupt perjury. No keeper of any prison shall be required to carry any prisoner a greater distance than two miles from his pri-

son, to or before any officer or examiner; except that the keepers of prisons in Middlesex or London, and of the prisons of the King's Bench and Marshalsea, and in Horsemonger-Lane, and of the borough of Southwark, shall carry their prisoners before such officer at the office of the said court, or at such other place within the bills of mortality as the said court shall direct. § 7.

The court may order prisoners to be confined within the walls, if it see proper. § 8.

The justices at the quarter-sessions are empowered to remand a prisoner who refuses to be sworn, or to answer proper questions; and the justices shall have the same powers to compel the attendance of witnesses and the production of papers, as now are possessed by the superior courts at Westminster; and the clerk of the peace, who is hereby authorized to issue such subpoenas as may be requisite, in each of which the names of not more than four persons shall be inserted, for each subpoena shall receive from the person requiring the same the sum of 2s. 6d. and no more: But no witness shall be obliged to attend, unless the party on whose behalf he shall be required, shall have previously tendered an allowance for his expences. § 9.

Where any prisoner in actual custody or arrested within the counties of Middlesex or Surrey, or the city of London, had, at or immediately before such arrest, his usual place of abode in some other county or place, it shall be lawful for the court to receive affidavits of any creditors or other persons not resident within the said counties or city, in opposition to the discharge of such prisoner, and to permit interrogatories to be filed for the examination of any person making or joining in such affidavit, and also to stay the discharge of such prisoner, until such interrogatories shall be fully answered, or until the expiration of six weeks from the filing of such interrogatories. § 10.

No prisoner who shall have petitioned the court for relief under the said act shall be discharged out of custody as to any action, suit, or process, in or by which he shall be charged or detained in custody for any debt or damages, which shall be *admitted* by such prisoner in his schedule, or which shall be *disputed* therein *only as to the amount*, by virtue of any supersedeas, judgment of non-pros, or judgment as in the case of a nonsuit for want of the plaintiff in such action, &c. proceeding therein. § 11.

If any married woman, being a prisoner, shall petition to be discharged, the court may receive such petition without requiring such married woman to execute a conveyance or assignment, or warrant, according to the provisions of the said act; but, instead thereof, the court shall require such married woman to execute a conveyance and assignment for vesting in such provisional assignee as aforesaid all property, real and personal, to which she may be entitled for her separate use, or over which she shall have any power of disposition notwithstanding her coverture, or which shall be vested in any trustee or other person for her benefit, and to deliver up all personal estate and effects of which she shall have the actual

possession (except her wearing apparel, bedding, and other such necessities, not exceeding in the whole the sum of 20*l.*) and also all other real and personal estate and effects to which she shall be entitled in any manner whatsoever, in possession, remainder, or reversion, subject only to such right, title, or interest, as her husband may have therein; all which acts she is hereby empowered to do without her husband, notwithstanding her coverture, so nevertheless as not to prejudice any rights of her husband in such real and personal estate and effects respectively; and she shall also execute a warrant of attorney to confess judgment in one of the superior courts aforesaid, for the amount of the debts remaining unpaid, from which she shall be discharged under the authority of the said act as aforesaid; which warrant of attorney shall be sufficient authority for entering up judgment against her, notwithstanding her coverture; but such judgment shall not in any manner prejudice or affect the rights of her husband, except that the same shall be deemed and taken to be her debt, in case she shall die in the life-time of such husband, to the end that the same may be discharged out of her personal assets in a due course of administration, or out of her real estate, if she shall have any at the time of her death, but without prejudice to any estate or interest of her husband therein as tenant by the courtesy; and in case such woman shall, during the life-time of her husband, become entitled to any property for her separate use, such judgment may be enforced against such separate property, by suit in equity, or otherwise, under the order of the said court, for the purpose of obtaining payment of so much of the debts from which such woman shall have been discharged by such court as shall then remain unpaid; and in case such woman shall survive her said husband, such judgment may after his death be enforced against such woman or her property, real and personal, in the same manner and with the same effect as it might have been if she had been sole and unmarried at the time she executed such warrant to confess judgment, and at the time when such judgment shall have been entered up as aforesaid; provided always nevertheless, that the discharge of any married woman under the authority of the said act or of this act, shall not operate to discharge her husband from any debt from which his wife shall be so discharged; but such debt, so far as the same shall remain unpaid or unsatisfied, shall be chargeable upon and in force against such husband, as fully, to all intents and purposes, as if his wife had not obtained such discharge. § 12.

Prisoners obtaining discharge shall be discharged against any creditor for any sum payable at a future time. § 13.

If an insolvent, after his discharge, shall refuse or neglect to appear before the court, or before the justices at their sessions, when the court shall direct the matter to be re-heard before such justices, at the time specified in any rule of the said court (a copy whereof shall have been duly served on such insolvent), it shall be lawful for the court to order him to be apprehended and remanded into custody, in such prison as it shall direct, and to cause him to be

brought up for examination as often as to the said court or justices shall seem fit. § 14.

If any prisoner shall have been adjudged not to be discharged, or entitled to any protection under the act, until he shall have been in custody at the suit of a certain creditor or creditors for a certain period, and the court shall see cause to believe that such adjudication has been obtained on false evidence, or otherwise fraudulently obtained or improperly made, the court may direct such prisoner to be brought again before it, and, upon due notice given to the creditors named in the same order, to re-hear the matter, and set aside the said adjudication if they shall see cause, and make such further order as shall seem fit. § 15.

Any attorney or agent removed from the files of the court, and afterwards practising, shall be guilty of a contempt, and liable to fine and imprisonment. § 16.

All affidavits must be sworn either before the court, or a commissioner thereof, or a commissioner appointed by the court for the purpose of taking affidavits, or a master extraordinary in chancery, or a commissioner for taking affidavits in any of the superior courts of Westminster Hall, or, in Scotland or Ireland, before a magistrate of the county, division, city, town, or place. § 17.

Estates, &c. of insane persons are to be vested, on their discharge, in provisional or other assignees, the same as if they were of sound mind; and every assignment hitherto made in such case by the court shall be good and effectual; and it shall be lawful for the court to order judgment to be entered up against such prisoner, in the same manner as if he had been of sound mind, and had executed a warrant of attorney in the manner by the said act provided. § 18.

When any assignment shall be avoided by a commission of bankrupt being issued against any prisoner, no action or suit shall be commenced for any thing done by virtue of the said assignment, except to recover any property, estate, money, or effects of the said bankrupt, detained after demand thereof. § 19.

The court may invest in the public funds, &c. unclaimed money, and apply the interest towards expences of the court. § 20.

After the court is built in Portugal Street, all matters are to be heard there, unless the court think proper to adjourn to any other place. The keepers of the prisons, or their deputies, shall be entitled to the sum of three shillings from each prisoner, for carrying him before the court, on the hearing of his petition and schedule. § 21.

In all rules, orders, warrants, and other proceedings of the court, it shall be sufficient to set forth such rule, order, or warrant, without setting forth the petition, conveyance or assignment to the provisional assignee, appointment of assignee or assignees, or any assignment whatever, or the schedule, balance sheet, order for hearing, adjudication, order for discharge, &c. §. 22.

After the expiration of six weeks from the last day of Trinity term until the 1st of November, in every year during the continu-

ance of the said act, the court shall have full power to regulate and appoint its sittings, at such times as to the said court shall appear fit and necessary for the due administration of justice; provided always, that no adjournment shall be at any time for more than six weeks. § 23.

In every information and indictment for omitting any property from schedule, or for aiding therein, it shall be sufficient to set out the substance of the offence charged, without setting forth the petition, or conveyance or assignment to the provisional assignee, appointment of assignee or assignees, or any assignment whatever, or balance sheet, order for hearing, adjudication, order for discharge or remand, or any warrant, rule, order, or proceeding of or in the said court, except so much of his schedule as may be necessary for that purpose. § 24.

Further Amendment of the Insolvent Debtors' Act.

By the 5 Geo. IV. c. 61. so much of the Insolvent Acts as gives any power, authority, or jurisdiction, or enables the Court for Relief of Insolvent Debtors to give or delegate any power, authority, or jurisdiction, to any justices of the peace at their general or general quarter sessions of the peace, or at any adjournment thereof, shall be repealed; except as to the justices of the peace in the principality of Wales. § 1.

And where any prisoner shall be in any county gaol, or other gaol or prison in England, except in the counties of Middlesex or Surrey, or in the city of London, or the borough of Southwark, upon any process whatsoever issuing out of his majesty's superior courts in Westminster Hall, or out of any court whatsoever in England, then, upon petition being made to the said Court for Relief of Insolvent Debtors by such prisoner, and upon such schedule being delivered into the said court as is required, it shall be lawful for the said court to make a rule or order to cause such prisoner to be brought to and to appear at the court-house or other place in any assize or other town in the county, or county of a city or town, where such prisoner shall be imprisoned, on such day and at such time as shall be mentioned and specified in such order, not being more than four calendar months after the date of such order; and the expence of conveying such prisoner, in every case where the gaol in which such prisoner shall be confined shall not be situate within such assize or other town, not exceeding one shilling a mile, shall be paid to the keeper or gaoler, or officer who shall bring such prisoner, out of the estate or effects of such prisoner, if the same shall be sufficient, and if not, then such expence shall be paid by the treasurer of the county, county of a city or town, in which such prisoner shall be imprisoned, as the same shall be directed or ordered by the commissioner before whom such prisoner shall be brought. § 2.

And on such day so appointed, it shall be lawful for any one commissioner of the said court to attend at such court-house or other place in such assize or other town, and to proceed on such

day, and from day to day, if requisite, in hearing the matter of such petitions of any prisoner or prisoners, who shall appear, and to pronounce any such judgment, and to make all such orders, and to give all such directions, and to do all such other matters and things requisite for the discharging or remanding of every such prisoner, and for the assignment and application of the estate and effects of every such prisoner, as the said Court for Relief of Insolvent Debtors could or may do. § 3.

And it shall be lawful for his majesty to appoint one other commissioner, in addition to those already appointed; and that three of the said commissioners shall from time to time severally make circuits, and give their attendance respectively at the several assize or other towns at which any prisoner or prisoners shall be ordered to appear in manner aforesaid, so that the circuits shall be three times in each year, if requisite. § 4.

The clerk of the peace, or his deputy, shall attend and act as clerk to the commissioner, and shall be entitled to receive from every prisoner in whose case he shall act, the sum of 5s. the same to be in lieu of all fees of every nature and kind. § 5.

Notice of the time and place of the attendance of such commissioner in each county, or county of a city or town, shall be given in the London Gazette, and in some public journal or newspaper published in each such county respectively, once in each of the two weeks immediately preceding such attendance. § 6.

When the commissioner does not attend on the day appointed, the court shall stand adjourned to the next day. § 7.

And such commissioner shall, without delay, state in writing the reason or cause which prevented him from arriving, and shall send the same forthwith by the post, subscribed by himself, to one of his majesty's principal secretaries of state. § 8.

And on any particular occasion, when the said commissioners shall be of opinion that it would be expedient that all of them should be absent from London in different places at the same time, it shall be lawful for them to state such opinion, together with the grounds and reasons thereof, in writing, to one of his majesty's principal secretaries of state; and if such secretary of state shall approve thereof, it shall be lawful for all the commissioners to be absent from London at the same time, in such places respectively as shall be so mentioned and allowed. § 9.

And the said court, or the said commissioner upon his circuit, shall, from time to time, as occasion may require, appoint as many fit persons as may be judged sufficient, as examiners; and if it shall appear to be expedient and proper, that the accounts of any prisoner, and the matters of his schedule, should be further investigated and examined, then it shall be lawful to adjourn the hearing of the petition of such prisoner, and, at the request of any one or more of the creditors, to order and direct that some one of the examiners shall examine into the matters of the said schedule, and certify his opinion thereon, and that such examiner shall receive for his trouble 1*l*. and no more, for every meeting under such order, to be paid by the person or persons requiring the same. § 10.

And where an order has issued for the hearing of the matter of the petition and schedule of any prisoner at any assize or other town, such prisoner shall cause the duplicate of such petition and schedule, and all books, papers, and writings relating thereto, in his or her possession or power, to be lodged with the clerk of the peace, or his deputy, within ten days after such order, or on such earlier day as shall be named in such order; and such prisoner shall be subject to such order as the court shall make to enforce compliance. And the said clerk of the peace, or his deputy, shall, on the reasonable request of such prisoner, or of any creditor or creditors, or his or her attorney, produce such petition and schedule, and books, papers, and writings, and permit them to inspect and examine the same, on the payment of one shilling; and such clerk of the peace, or his deputy, shall provide a copy or copies of such petition or schedule, or such part thereof as shall be so required; for which he shall be entitled to receive four-pence for every sheet containing seventy-two words and no more, unless the same shall be the last or only sheet, in which case he shall be entitled to four-pence, although it does not contain seventy-two words; and every such prisoner shall cause the said duplicate of his schedule, and his said books, writings, and papers, to be produced at his hearing. § 11.

And it is further enacted, that the said acts shall not extend to any person in actual custody, who shall not be at the time of filing his petition, and during all the proceedings thereon, in actual custody within the walls of the prison, nor to any prisoner who, after his commitment to any prison in any county or place where he or she had, at or lately before his or her arrest, his or her usual place of abode, other than in Middlesex, Surrey, London, or Southwark, aforesaid, shall cause himself to be removed by any writ of *habeas corpus*, or otherwise, from such respective prison to any other prison. § 12.

And where it shall appear to the satisfaction of the court that any prisoner arrested within the counties of Middlesex or Surrey, or the city of London, or borough of Southwark, had, at or lately before such arrest, his usual place of abode in some other county or place; or where any prisoner, having been arrested in any other county or place, shall be rendered in discharge of his bail; it shall be lawful for the court, upon the request and at the expence of any of his creditors, to order such prisoner to be taken to the gaol of the county or place where he had, at or lately before such arrest or render, his usual place of abode, and to be brought for hearing and examination to the assize or other town of the county, to the gaol whereof he shall have been so removed; and such expence incurred by such creditor shall be repaid to him by the assignees out of the estate, effects, and property of such prisoner, before any dividend shall be made. § 13.

And it is further enacted, that the filing of the petition of every person in actual custody, who shall be subject to the several statutes concerning bankrupts, or any of them, and who shall apply by petition for his or her discharge, shall be accounted

and adjudged an act of bankruptcy: provided, that no commission of bankrupt shall issue against such person upon such act of bankruptcy, after the said court or commissioner shall have ordered such prisoner to be discharged forthwith or at any future period, or not to be discharged until a certain period. § 14.

Assignees shall cause fourteen days' notice to be given in the London Gazette, and such one or more newspaper as the said court or commissioner shall order, of the day on which, and place where, a dividend shall be made among the creditors, unless such prisoner, or his or her assignees, or any other creditor, shall object to any debt, in which case the same shall be examined into by the said court or commissioner; and every such prisoner shall be thenceforth discharged from the debts of all such creditors who shall accept any such dividend; and it shall be lawful for the said court or commissioner to make an order accordingly, specifying the debts from which such prisoner shall be so discharged. § 15.

The 3 Geo. IV. c. 39. intituled, "*An act for preventing frauds upon creditors by secret warrants of attorney to confess judgment;*" shall extend to the provisional or other assignee of every prisoner who shall, after the expiration of twenty-one days next after his execution of such warrant of attorney or *cognovit actionem* as therein mentioned, apply by petition to the said court for his or her discharge from confinement; and such provisional or other assignee shall be entitled to recover back and receive, for the use of the creditors of such prisoner, all and every the monies levied or effects seized under or by virtue of any such judgment or execution. § 16.

And if any prisoner who shall file his petition for his discharge shall, before or after his imprisonment, being in insolvent circumstances, voluntarily convey, assign, transfer, charge, deliver, or make over any estate, real or personal, security for money, bond, bill, note, money, property, goods, or effects whatsoever, to any creditor or creditors, every such conveyance, assignment, transfer, charge, delivery, or making over, shall be deemed to be fraudulent and void: provided always, that no such conveyance, assignment, transfer, charge, delivery, or making over, shall be so deemed fraudulent or void, unless made within three months before the filing of the said petition, or with the view or intention of filing a petition. § 17.

The court may order such part of salary of officers of customs and excise as the commissioners thereof shall consent to, to be applied in payment of such officers' debts. § 18.

And in all cases in which a person shall take the benefit of the said acts, and shall be entitled to any lease or agreement for a lease, and his assignee or assignees shall accept the same and the benefit thereupon as part of the insolvent's estate and effects, the insolvent shall not be deemed liable to pay the rent accruing due after such acceptance of the same; and, after such acceptance, the insolvent shall not be liable to be in any manner sued in respect or by reason of any subsequent non-observance or non-

performance of the conditions, covenants, or agreements therein contained: provided, that in all such cases as aforesaid, it shall be lawful for the lessor or person agreeing to make such lease, his heirs, executors, administrators, or assigns, if the assignee or assignees shall decline, upon his or their being required so to do, to determine, whether he or they will or will not accept such lease or agreement for a lease, to apply to the said court or commissioner, praying that he or they may either so accept the same, or deliver up the lease or agreement for the lease, and the possession of the premises demised or intended to be demised; and such court or commissioner shall thereupon make such order as in all the circumstances of the case shall seem meet and just. § 19.

And wherever any creditor or creditors opposing a prisoner's discharge shall prove to the satisfaction of the court, that such prisoner, with intent to conceal the state of his affairs, or to defeat the objects of the said acts or this act, has destroyed, or otherwise wilfully prevented or purposely withheld the production of any books, papers, or writings relating to such of his affairs as are subject to investigation, or shall have kept or caused to be kept false books, or made false entries, or shall have wilfully or fraudulently altered or falsified any such books, papers, or writings, or shall in any respect have been guilty of fraud in discharging or concealing any debt due to or from the said prisoner, or shall have fraudulently made away with, charged, mortgaged, or concealed any part of his or her property, of what kind soever, either before or after his or her said imprisonment, for the purpose of diminishing the sum to be divided among the creditors, or of giving an undue preference to any of them, the court shall order the taxed costs of the said opposition to be paid to such opposing creditor out of the estate and effects of such prisoner; and in all other cases of opposition to the prisoner's discharge being substantiated or effectual, it shall be lawful for the court to make a like order, if it shall seem fit. § 20.

The chief or any one commissioner may hear and determine out of court, upon summons to the proper parties, all matters and things relating to any prisoner or person discharged by any act for the relief of insolvent debtors, or to his estate, property and effects, or his assignee or assignees thereof, except the hearing, re-hearing, or any examination of any such prisoner or person discharged. § 12.

And it shall be lawful for the court, or chief or other commissioner, to order such portion of the salary, pay, emoluments, or pension of any prisoner being or having been an officer or clerk, or being or having been otherwise employed or engaged in the service of his Majesty in any civil office, or of the Court of Directors of the Honourable East India Company, or any other department whatsoever, as the said court may order in writing, and as upon communication with the chief officer of the department in which such insolvent may be belonging at the time, or in which he may have served, and to which such chief officer shall consent in writing, to be applied in payment of the debts of such person. § 22.

INSURANCES.

IN compiling the following pages on insurances, the author is particularly indebted to a very useful compendium on the subject written by Mr. Annesley, who professes to have followed the luminous arrangement of Park in his work "On the Law of Marine Insurances;" the only advantage which this treatise can boast over its prototype is, that, appearing at a later period, it has the benefit of consulting all the new cases and enactments which have taken place since the appearance of the original work.

OF MARINE INSURANCES.

Insurance, or assurance, according to Blackstone, is a contract by which the insurer undertakes, in consideration of a premium, to indemnify the person insured against certain perils or losses, or against some particular event.

Of the Policy.

Policy is the name given to the instrument by which the contract of indemnity is effected between the insurer and insured; it is not, like most contracts, signed by both parties, but only by the insurer (the party who takes on him the risk), who, on this account, is called the *underwriter*.

There are two kinds of policies: the valued, and open. The difference is, that in the former, property insured is valued at prime cost at the time of effecting the policy; in the latter, the value is not mentioned. In the case of an open policy, the real value must be proved; in the other, it is agreed.

Policies are only simple contracts, but they are of great credit, and ought not to be altered when once they are signed, unless there be some uniform document to shew that the meaning of the parties was mistaken, or unless by consent. They are partly printed, to serve for general purposes; and partly written, for the purpose of inserting the names of the parties, and to express their particular meaning.

There are nine requisites to a policy:—

1. The name of the person insured.

By 28 Geo. III. c. 56. it is enacted, that it shall not be lawful for any person to make assurance on ships or goods, without inserting the name or firm of one or more of the parties interested; or the name or firm of the consignor or consignee; or of the person receiving the order for, or effecting the policy; or of the person giving directions to effect the same. All policies without one or other of these requisites, are null and void.

2. The names of the ship and master; unless the insurance be general, of any ship or ships.

3. Whether the insurance be made on ships, goods, or merchandizes. But there are some kinds of merchandize which are of a perishable nature, and liable to early corruption; on account of which the underwriters have inserted a memorandum at the foot of their policy, by which they declare, that in insurances, "Corn, fish, salt, fruit, flour, and seed, are warranted free from average, unless general, or the ship be stranded. Sugar, tobacco, hemp, flax, hides, and skins, are warranted free from average under *five pounds per cent.*; and all other goods, also the ship and freight, are warranted free of average under *three pounds per cent.* unless general, or the ship be stranded."

4. The name of the place at which the goods are laden, and to which they are bound.—A policy therefore from London to — is void. It is also usual to state at what ports or places the ship may touch or stay, to avoid questions on deviation.

5. The time when the risk commences, and when it ends.—On the goods, it usually begins from the lading on board the ship, and continues till they are safely on board the ship; from her beginning to lade at A, and continues till she arrives at the port of destination, and be there moored in safety twenty-four hours.

6. The various perils against which the underwriters insure.—The words now used in policies are so comprehensive, that there is scarcely any event unprovided for. The insurer undertakes to bear "all perils of the seas, men of war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and countermart, surprisals, takings at sea, arrests, restraints, and detainerments of kings, princes, and people of what nation, condition, or quality soever; barratry of the master and mariners; and all other perils, losses, and misfortunes, that have or shall come to the hurt, detriment, or damage of the said goods and merchandizes, and ship, or any part thereof."

The policy is frequently made with the words, *lost or not lost*, in it, which are peculiar to English policies, and add greatly to the risk; as, though the ship be lost at the time of the insurance made, the underwriter is liable, if there be no fraud.

7. The premium or consideration for the risk; which is always expressed in the policy to be received at the time of underwriting: but policies in general are effected by the intervention of a broker, between whom and the insurers, open accounts are kept by the usage of trade.

8. The day, month, or year on which the policy was executed.

9. And, lastly, the policy must be duly stamped; for the amount of which the reader is referred to the article *Policy*, in the Stamp Duties, at the end of this Work.

By 11 Geo. I. c. 30. when an insurance is made, a policy must be made out within three days, under a penalty of 100*l.*; and by the same statute promissory notes for insurances are void.

Policies being generally effected by the intervention of a broker, the name of the agent of an insurer residing abroad must be mentioned in the policy: and such agent is liable to an action *for not insuring*, which is to be tried on the same principles as an action on a policy; and the defendant is entitled to every benefit of which the underwriter might take advantage.

A policy being considered as a simple contract of indemnity, must always be construed, as nearly as possible, according to the intention of the contracting parties, and not according to the strict meaning of the words. And in questions on such construction, no rule has been more frequently followed, than the usage of trade, with respect to the voyage insured.

A policy on a ship generally from A to B, is construed to mean till the ship is unladen. But if it contain the usual words, *till moored twenty-four hours in safety*, the insurers shall be answerable for no loss that does not actually happen before the expiration of the time; even though the loss be occasioned by an act (of bar-ratry by the master) committed during the voyage insured.

The great and leading cases on questions of construction are two; *Tierney v. Etherington*, and *Pelley v. Royal Exchange Company*. In these cases the principles to be observed in the construction of policies are fully considered; and in the latter of them, Lord Mansfield observed, that "the insurer, at the time of underwriting, has under his consideration the nature of the voyage, and the usual manner of doing it; and what is usually done by such a ship, with such a cargo, in such a voyage, is understood to be referred to by every policy." The same principles were adhered to in a subsequent case, where the same learned judge remarked, that every underwriter is presumed to be acquainted with the practice of the trade he insures; and if he does not know it, he ought to inform himself. So, in the construction of a policy upon time, the same liberality prevails as in other cases; and an attention to the meaning of the contracting parties has always been paid.

The usage of trade with respect to East-India voyages has been more notorious than any other, the question having more frequently occurred. The charterparties of the East-India Company give leave to prolong the ship's stay in India for a year, and it is common by a new agreement to detain her a year longer. The words of the policy too are very general, without limitation of time or place. These charterparties are so notorious, and the course of the trade so well known, that the underwriter is always liable for any intermediate voyage, upon which the ship might be sent while

in India, though not expressly mentioned in the policy. These principles were fully laid down and settled in the nine causes tried upon the ship *Winchelsea East-Indiaman*; the nine verdicts in which were ultimately uniform for the plaintiffs the insured, against the underwriters, which have been since recognized and allowed in subsequent cases.

However, the parties may, by their own agreement, prevent such latitude of construction. Nor need this be done by express words of exclusion; but if, from the terms used, it can be collected, that the parties meant so, that construction shall prevail: and the equitable principles of construction shall never be carried so far as than when a man has insured one species of property, he shall recover a damage which he has suffered by the loss of a different species. Thus, one who has insured a cargo of goods, cannot, under that insurance, recover the freight paid for the carriage; nor can an owner who insures the *ship merely*, demand satisfaction for the loss of the merchandize laden thereon, or extraordinary wages paid to seamen, or the value of provisions, by reason of detention of the ship at any port.

In the construction of policies, the loss must be a *direct and immediate consequence* of the peril insured, and not a remote one, in order to entitle the insurer to recover.

Policies of insurance are to be construed by the same rules as other instruments, unless where, by the known usage of trade or the like, certain words have acquired a peculiar sense distinct from their ordinary and popular sense.

A policy on a foreign ship must be understood as containing an exception of all captures made by the authority of our own government.

Every insurance on alien property by a British subject, must be understood with this implied exception, that it shall not extend to cover *any* loss happening *during the existence of hostilities* between the respective countries of the assured and assurer.

Goods insured on board a certain ship generally by her name, without any addition of country, and not represented to be of any particular country at the time of the policy subscribed (though the broker had before said she was *an American*, when the ship was subscribed, and though she was in fact *an American*), need not be documented as such; and therefore, in case of a capture by a foreign state for want of the documents required by treaty between that state and her own, the owner of the goods may recover against the underwriters.

Of Warranties.

A warranty, in a policy of insurance, is a condition or a contingency, that a certain thing shall be done or happen, and unless that is performed there is no valid contract. It is immaterial for what end, if any, the warranty is inserted in the contract; but being

inserted, it becomes a binding condition upon the insured, and he must shew a literal compliance with it. So, on the contrary, warranties shall be strictly construed in favour of the insured. As where a ship is warranted well on any day certain, though she be lost by eight in the morning of the day when the policy was effected at noon, the underwriter shall be liable. It is no matter whether the loss happen in consequence of the breach of warranty or not; for the very meaning of inserting a warranty is to preclude all inquiry about its materiality. It is also immaterial to what cause the non-compliance is to be attributed; for although it might be owing to the merest accident, or to the most wise and prudential reasons, the policy is avoided.

In this strict and literal compliance with the terms of a warranty, consists the difference between a warranty and a representation; the latter of which need only be performed *in substance*, while a warranty must always be complied with strictly. In a warranty, the person making it takes the risk of its truth or falsehood on himself; in a representation, if the insured asserts that to be true, which he either knows to be false, or about which he knows nothing, the policy is void on account of fraud; but a representation made without fraud, if not false in a *material* point, does not vitiate the policy.

In order to make written instructions binding as a warranty, they must appear on the face of, and make a part of the policy. For though a written paper be *wrapt in the policy*, and shewn to the underwriters at the time of subscribing, or even if it be *wafered to the policy*, it is not a warranty, but a representation. But a warranty written *in the margin* (transversely or otherwise) of the policy, is considered to be equally binding, and liable to the same strict construction as if written in the body of the policy. If the underwriter pay the loss on a policy, and after find that such a warranty was not strictly complied with, he may recover back the money again by action.

The various kinds of warranties are too numerous to be mentioned, depending generally upon the particular circumstances of each case. The three cases of warranty, on which most questions have arisen, are, as to the *time* of sailing, *convoy*, and *neutrality* of property.

As to the first of these, if a man warrant to sail *on* a particular day, and be guilty of a breach of that warranty, the underwriter is no longer answerable. And a detention by government, previous to the proposed day of sailing, is no excuse for not complying with the warranty, nor a peril within the terms of the policy.

So if the warranty be to sail *after* a specific day, and the ship sail *before*, the policy is equally avoided as in the former case.

But when a ship leaves her port of lading, having a full and complete cargo on board, and having no other view but the safest mode of sailing to her port of delivery, for which purpose she

touches at any particular place of rendezvous for convoy, &c. ; her voyage must be said to commence from her departure from that port, and though she be detained at such place or rendezvous by an embargo, she has complied with the warranty.

As to warranty of sailing with convoy. If the insured warrant that the vessel *shall depart with convoy*, and it do not, the policy is defeated, and the underwriter is not responsible.

A sailing with convoy from the usual place of rendezvous, as Spithead for the port of London, is a *departure* with convoy within the meaning of such a warranty. And although the words used are generally to *depart with convoy*, or to *sail with convoy*, yet they extend to sailing with convoy throughout the voyage.

But an unforeseen separation from convoy is a peril to which the underwriter is liable. And even when the ship has, without any neglect, by tempestuous weather, been prevented from joining the convoy at all ; at least, so as to receive the orders of the commander of the ships of war ; if she do every thing in her power to effect it, it shall be deemed a satisfaction of the warranty to sail with convoy.

The last species of warranty is that of *neutrality* ; or, that the ship and goods insured are neutral property. This is different from the two former ; for if this warranty be not complied with, the contract is not merely voided as for a breach, but it is absolutely void *ab initio*, on account of fraud, being a fact at the time of insuring within the knowledge of the insurer, an error in which must therefore arise from a deliberate falsehood on his part. But if the ship, &c. is neutral at the time the risk commences, the insurer takes upon himself the chance of war and peace during the continuance of the policy.

Sailing orders are necessary to the performance of a warranty to depart with convoy, unless particular circumstances exempt the insured from the general rule.

A warranty of neutrality, in a policy of insurance, is not falsified by a sentence in a foreign court of admiralty, condemning a ship for navigating contrary to the ordinances of that belligerent state to which the neutral country had not assented.

Where a foreign court of prize professes to condemn a ship and cargo, on the ground of an *infraction of treaty*, in not being properly documented, &c. as required by the treaty between the captors and captured, such sentence is conclusive in our courts against a *warranty of neutrality* of such ship and cargo in an action upon a policy of insurance against the underwriters, although inferences were drawn in such sentence from *ex parte* ordinances in aid of the conclusion of such infraction of treaty.

Any forfeiture of neutrality by the wilful act of the assured or of the master, &c. after the commencement of the voyage insured, is a breach of warranty of such neutrality.

A sentence of a foreign court of prize is conclusive evidence in an action upon a policy of insurance, upon every matter within

the jurisdiction of such court, upon which it has professed to decide.

Of Re-Assurances and Double Assurances.

Re-assurance is a contract which the first underwriter enters into in order to relieve himself from those risks which he has previously undertaken, by throwing them upon other underwriters, who are called re-assurers. It is a species of contract still countenanced in most parts of Europe, and which was admitted in England till it was found productive of glaring and enormous frauds. The legislature, therefore, found it necessary to interpose by an act, which permitted only such contracts of re-assurance as tended to the advancement of commerce, or the real benefit of the individual. By 19 Geo. II. c. 37. § 4. it is declared unlawful to make re-assurance, "unless the assurer or underwriter should be *insolvent*, become a bankrupt, or die; in either of which cases such assurer, his executors, administrators, or assigns, may make re-assurance to the amount before by him assured, expressing in the policy that it is a re-assurance:" and the statute extends to re-assurance on *foreign* ships previously insured by foreign underwriters.

Double assurance is totally different from re-assurance. It is where the same man is to receive two sums instead of one, or the same sum twice over, for the same loss, by reason of his having made two insurances upon the same property. It makes no difference whether such insurances are both, or either, made in the name of the insurer, or of another person, if actually made on his account.

These double insurances are not void. The person insuring, however, shall receive only one satisfaction to the real amount of his loss, and no more, which he may recover against which set of underwriters he pleases. And when one set of underwriters pay the loss, they may call upon the other underwriters to contribute in proportion to the sums they have insured. But though a double insurance cannot be wholly supported, so as to enable a man to recover a two-fold satisfaction, yet various persons may insure various interests on the same thing, and each to the whole value; as the master for wages, the owner for freight, one person for goods, and another for bottomry, &c.

Of Losses upon Policies of Insurance.

Of total Loss by Peril of the Sea.—The loss must always be a *direct and immediate consequence* of the peril insured, and not a remote one, in order to entitle the insured to recover.

A total loss in insurances does not always mean that the property insured is irrecoverably lost or gone; but that, by some of the perils mentioned in the policy, it is in such a condition as to be of little use or value to the insured; and to justify him in abandoning his right to the insured, and calling upon him to pay the whole of his insurance.

The insured may call upon the underwriter for a total loss, if the voyage be absolutely lost, or not worth pursuing; if the salvage be high, or half the value; or if further expence be necessary, and the underwriter will not engage at all events to bear that expence.

In a total loss properly so called, the prime cost of the property insured, or the value in the policy, must be paid by the underwriter, according to his proportion of the insurance. Where a policy is a *valued* one, and a total loss ensue, it is only necessary to prove that the goods were on board at the time of the loss, unless the underwriter can shew that the insured had only a colourable interest, or has greatly overvalued the goods; but, where it is an open policy, the value must be proved, as it must in case of a *partial loss* on a *valued* one.

Questions as to losses by *perils of the sea* have very seldom arisen; the general rule is, that every accident happening by the force of the wind or waves, by thunder and lightning, by driving against the rocks, or by the stranding of the ship, or any other violence that human prudence could not foresee, nor human strength resist, is to be considered as a peril of the sea; and for such losses the underwriter is answerable.

A ship which is never heard of after her departure, is presumed to have perished at sea. In England, no time is fixed within which payment of a loss may be demanded from the underwriter, in case the ship is not heard of. But a practice prevails among merchants, that a ship shall be deemed lost, if not heard of within six months after her departure for any port of Europe, or within twelve, if for a greater distance.

Of Losses by Capture.—Capture is a taking of the ships or goods belonging to the subjects of one country, by those of another, when in a state of war. As between the underwriter and the insured, a ship is to be considered as lost by the *capture*, though she be never condemned at all, nor carried into any port or fleet of the enemy; and the underwriter must pay the loss actually sustained. If therefore, either before or after condemnation, she be retaken, and the owner have paid salvage, the insurer must pay the loss sustained in consequence.

No capture by the enemy can be so total a loss as to leave no possibility of recovery. If the owner himself should retake at any time, he will be entitled; and if an English ship retake the vessel captured, either before or after condemnation, the owner is entitled to restitution on stated salvage. In all such cases, if the loss be paid by the underwriter before the recovery, he stands in the place of the insured, and will be entitled to the benefits of the restitution. This chance does not, however, suspend the demand for a total loss upon the insurer; but justice is done, by putting him in place of the insured in case of a re-capture.

Before the stat. 19 Geo. II. c. 37. which abolished wager policies, the re-capture had a considerable effect upon the contract of insurance, and several cases were determined on that question.

But now the contract is not at all altered between the underwriter and the insured by such an event.

By the marine law of England, as practised in the court of Admiralty, it was formerly held, that the property was not changed so as to bar the original owner in favour of a vendee or a re-captor, till there had been a sentence of condemnation. And now by the above statute this right of the original owner, in case of a re-capture, is preserved to him *for ever*, upon payment of certain salvage, from one-eighth to half the value, to the re-captors.

By 22 Geo. III. c. 25. it is unlawful for any British subject to ransom, or to enter into any contract for ransoming, any ships belonging to any British subjects, or any goods on board the same, which shall be captured by the subjects of any state at war with his majesty, or by any persons committing hostilities against his subjects.

And all contracts which shall be entered into, and all bills, notes, and other securities, which shall be given by any person for ransom of any ship, or of any goods on board the same, shall be absolutely void. § 2.

And if any person shall ransom, or enter into any contract for ransoming, any such ship, or any goods on board the same, such person shall forfeit 500*l.* which may be sued for by any one. § 3.

Of Losses by Detention of Princes.—On questions of detention not much difficulty has arisen; the underwriter by express words undertakes to indemnify against all damages arising from the arrests, restraints, and detainments of kings, princes, or people.

Under these terms in a policy, *detention* is said to be an arrest or embargo in time of war or peace, laid on by the public authority of a state. And therefore, in case of an arrest or embargo by a prince, though not an enemy, the insured is entitled to recover against the underwriter.

In case of detention by a foreign power, which in time of war may have seized a neutral ship, in order to be searched for enemy's property, the costs and charges consequent thereon must be borne by the underwriter. But a detention for nonpayment of customs, or for navigating against the laws of those countries where the ships happen to be, does not fall upon the underwriter: and in that case it was held by Mr. Justice Buller, that detention by particular ordinances, which do not form a part of the general law of nations, is a risk within a policy of insurance.

In all cases of losses by detention, before the insured can recover, he must abandon to the underwriter whatever claims he may have to the property insured.

A policy of insurance on a ship and stores "at and from a port" in a foreign country, in the common form against arrests of princes, people, &c. extends to an embargo laid on by the government of that country in the loading port. And if the embargo continue, the assured may abandon and recover as for a total loss.

Of Loss by Barratry.—Barratry is any act of the master or mariners, of a criminal nature, or which is grossly negligent, tending to their own benefit, to the prejudice of the *owners of the ship*, and without their consent or privity.

It is barratry in the master to smuggle on his own account. And, in *Robertson v. Ewer*, Chief Justice Buller seemed to think the breach of an embargo was an act of barratry in the master. But if the act of the captain be done for the benefit of his owners, and not with a view to his own interest, it is not barratry. Some question has been made in certain cases, who shall be considered as owner? And it has been determined, that if the owner of the ship freight it out for a specific voyage, the freighter is to be considered as owner *pro hac vice*; and if the master commit a criminal act without *his* privity, though with the knowledge of the original owner, it is barratry.

An act of the captain *with the knowledge of the owners of the ship*, though without the privity of the owner of the goods, who happened to be the person insured, is not barratry, as that crime can only be committed *against the owner of the ship*, and without his consent. And if the master of the ship be also the owner, he cannot be guilty of barratry.

It is not necessary, in order to make the underwriters liable, that the loss should happen in *the very act of barratry*; for, in case of a deceitful deviation, the moment the ship is carried from its proper track, with an evil intent, barratry is committed; but the loss in consequence of the act of barratry, must happen *during the voyage insured*, and within the time limited for the expiration of the policy.

The underwriters, by express words, undertake generally for the barratry of the master and mariners, even though the master is appointed by the insured himself; a circumstance peculiar to the insurance law of England.

By 1 Ann. st. 2. § 9. it is felony without benefit of clergy, on any captain, master-mariner, or officer belonging to any ship, who shall wilfully burn or destroy her, to the prejudice of the owner, or any merchant lading goods thereon. And by 12 Ann. st. 2. c. 18. this was extended to owners and others guilty of those acts, to the prejudice of the *underwriters* as well as merchants; and the 11 Geo. I. c. 29. still further enlarges it to all such persons guilty *with intent* to prejudice underwriters or owners. By these acts, if the offence be committed within the body of a county, the offender shall be tried in a court of common law; if upon the high seas, he shall be tried according to the directions of 28 Hen. VIII. c. 16.

Barratry is any fraudulent or criminal act against the owners of ship or goods by the master or mariners, in breach of the trust reposed in them, and to the injury of the owners; although it may not be done with intent to injure them, or to benefit at their expence the master or mariners. Therefore, where a master had general instructions to make the best purchases with dispatch, this would not warrant him in going into an enemy's settlement to trade

(which was permitted by the enemy), though his cargo could be more speedily and cheaply completed there; but such act, in consequence of which the ship was seized and confiscated, is barratrous.

So it has been held, that "*fraud was barratry*;" and if the master sail out of port, without paying port duties, whereby the goods are forfeited, lost, or spoiled, that is barratry. As is some breach of trust in the captain *ex maleficio*.

In *Moss v. Byrom*, it was held, that if the captain of a ship, contrary to the instructions of his owner, cruize for and take a prize, and the vessel is afterwards lost in consequence of it, he is guilty of barratry. For whatever is done by the captain to defeat or delay the performance of his voyage is barratry in him, it being to the prejudice of his owners; and though the captain might conceive what he did was for the benefit of the owners, yet if he acted contrary to his duty to them, it is barratry.

Of Loss by Stranding.—Questions on this subject have rarely occurred, as the mere stranding of the ship, unless attended by a total loss, would only subject the underwriter to an average or partial loss; but as there are some goods of a perishable nature, when they are damaged by such natural and inherent principles of corruption in themselves, the underwriters, by the ordinances of most countries, are held discharged. The underwriters in London therefore, by express words assert in their policy, that they will not be answerable for any partial loss happening to *corn, fish, salt, fruit, flour, and seed*, unless it arise by way of general average, or in consequence of the ship being stranded.

This clause was introduced to prevent the vexation of trifling demands, which must have arisen in every voyage, on account of the very perishable nature of the above commodities. This form was formerly used by the two insurance companies, as well as in private insurances, till the year 1754; when a ship having been stranded, and got off again, the insured recovered a small partial loss against the London Assurance Company, since which period the companies have left out the words, "or the ship be stranded;" and are now only liable, in cases of a general average: but the old form is still retained by private insurers.

Of General Average.

General average (according to the rule of the Rhodian Law, the principle of which is adopted by all maritime states) is this: "If goods are thrown overboard in order to lighten a ship, the loss incurred for the sake of all, shall be made good by the contribution of all." The goods must be *thrown* overboard; the mind and agency of man must be employed: if the goods are forced out of the ship by the violence of the waves, or are destroyed in the ship by lightning or tempest, the merchant alone must bear the loss. They must be thrown overboard *to lighten the ship*; if they are cast overboard by the wanton caprice of the crew or the passengers, *they*, or the master and owners for them, must make good the loss.

The goods must be thrown overboard *for the sake of all*, not because the ship is too heavily laden to prosecute an ordinary course through a tranquil sea, which would be the fault of those who had shipped, or received the goods; but because, at a moment of distress and danger, their weight or their presence prevents the extraordinary exertions required for the general safety. When the ship is in danger of perishing from the violent agitation of the wind, &c. or is labouring on a rock, &c: or when a pirate or an enemy pursue, gains ground, and is ready to overtake, no measure that may facilitate the motion and passage of the ship, can be really injurious to any one who is interested in the welfare of any part of the adventure, whether merchant, mariner, or underwriter, who must of course sanction every measure adopted for the preservation of the ship and cargo: and if the ship, and the residue of the cargo be saved from the peril by the voluntary destruction or abandonment of part of the goods, equity requires that the safety of some should not be purchased at the expence of others, and therefore all must contribute to the loss, which loss ultimately falls on the insurer.

If goods be put on board a lighter to enable the ship to sail into harbour, and the lighter perish, the owners of the ship and remaining cargo are to contribute; but if the ship be lost, and the lighter saved, the owners of the goods preserved are not to contribute, the lightening of the ship being an act of deliberation for the general benefit, but the saving of the lighter being accidental, and no way proceeding from a regard for the whole.

Diamonds and jewels, when a part of the cargo, must contribute according to their value; but ship provisions, the persons of the passengers, wearing apparel, and such jewels as merely belong to the person, bottomry or *respondentiâ* bonds, and the wages of the sailors, shall not any of them contribute.

Where a ship is obliged to go into port for the benefit of the whole concern, the charges of loading and unloading, and the wages and provisions of the workmen hired for the repairs, are a general average.

The French ordinance, in express terms, excludes from the benefit of general average goods stowed upon the deck of the ship; and the same rule prevails in practice in this country. Goods so stowed may in many cases obstruct the management of the vessel; and, except in cases where usage may have sanctioned the practice, the master ought not to store them there without the consent of the merchant.

In order to fix a right sum on which the average or contribution may be computed, and which in general is not made till the ship's arrival at her port of discharge, it is to be considered, what the whole ship, freight and cargo, would have produced net, if no jet-tison had been made; and then the ship, freight and cargo, are to bear an equal and proportionable part of the loss. According to the custom of merchants in England, the goods thrown overboard are to be estimated at the price for which the goods saved were sold freight and all other charges being first deducted.

Supposing therefore a general average to be settled upon the ship's arrival at the port of destination, according to the principles before advanced, it is necessary, in the first place, to take an account of the several losses which are to be made good by contribution; in the second place, to take another account of the value of all the articles that are to contribute, in which must be included the value of the goods, &c. thrown overboard, for otherwise the proprietors of those goods will receive their full value, and pay nothing towards the loss.

In England, it is usual for the broker, who has procured the policy of insurance, to draw up an adjustment of the average, which is commonly paid in the first instance by the insurers without dispute; the contribution may be recovered either by a suit in equity, or by an action at law, instituted by each individual entitled to receive, against each party that ought to pay, for the amount of his share. And in the case of a general ship, where there are many consignees, it is usual for the master, before he delivers the goods, to take a bond from the different merchants for payment of their portions of the average when the same shall be adjusted.

The contribution of a general average is in general not made till the ship arrive at the place of delivery; but accidents may happen, which may cause a contribution before she reach her destined port. Thus, when a vessel has been obliged to make a jettison, or by the damages suffered soon after sailing is obliged to return to her port of discharge; the necessary charges of her repairs, and the replacing the goods thrown overboard, may then be settled by a general average.

Small or petty average consists of such charges as the master is obliged to pay by custom, for the benefit of the ship and cargo; such as pilotage, beaconage, &c. The term is also used for a small duty paid by merchants, who send goods in the ships of other men, to the master, over and above the freight, for his care and attention. None of these charges ever falls upon the underwriter.

Of Partial Loss and Adjustment.

The contract of insurance being a contract of indemnity against loss, and not a contract for the security of gain, it becomes necessary, in cases of partial loss, to consider the mode by which such loss shall be adjusted, and in what proportion it is to be paid by the insurer. In cases of total loss, no difficulty can arise in the adjustment; for the prime cost of the property insured, or the value mentioned in the policy, must be paid by the underwriter; and since the 19 Geo. II. the constant usage has been; to let the valuation fixed in the policy remain, in case of total loss, unless the defendant can shew that the plaintiff had a colourable interest only, or that he has greatly overvalued the goods. But a partial loss opens the policy. Therefore as clearness and precision are necessary upon all subjects, and more especially upon this, it will be proper to observe, that when we speak of the underwriter being liable to pay, whether for total or partial losses, it must be understood that they are liable

only in proportion to the sums which they have underwritten. Thus, if a man underwrites 100*l.* upon the property valued at 500*l.* and a total loss happen, he shall only be answerable for 100*l.* that being the amount of his subscription; if only a partial loss, amounting to 60 or 70 *per cent.* upon the whole value, he shall pay 60*l.* or 70*l.* being his proportion of the loss, although in such cases the assured generally abandon to the underwriters, who stand in the place of the assured.

In a recent case, *Johnson v. Sheddon*, 2 East. 581. it was held, that the rule by which to calculate a partial loss on a policy on goods by reason of sea damage is, the difference between the respective gross proceeds of the same goods when sound and when damaged, and not the net proceeds; it being settled, that the underwriter is not to bear any loss from fluctuation of market or port duties, or charges after the arrival of the goods at their port of destination.

But partial loss, when applied to the ship, means a damage which she may have sustained in the course of her voyage from some of the perils mentioned in the policy; when to the cargo, it means the damage which the goods have suffered from storm, &c. though the whole or the greater part thereof may arrive in port. By express stipulation in the terms of the London policies, these losses do not fall upon the underwriters, unless they amount to 3*l. per cent.*; but if a loss arising from a *general average* (i. e. a contribution to a general loss) should be under 3*l. per cent.* there the underwriter is liable. And in all cases of a partial loss, the value in the policy can be no guide to ascertain the damage; but it becomes the subject of proof, as in case of an open policy.

When goods are partially damaged, the underwriter must pay the owner such proportion of the *prime cost*, or value in the policy, (or if no value is stated in the policy, then of the invoice price, with all charges and premiums of insurance) as corresponds to the proportion of diminution in value occasioned by the damage. Where an entire thing, as one hogshead of sugar, happens to be spoiled, if you can fix whether it be a third or a fourth worse, then the damage is ascertained; but this can only be done at the port of delivery, where the whole damage is known, and the voyage is completed; and whether the price of the commodity be high or low, it equally ascertains the proportion of damage; though no regard is to be paid to the rise or fall of the market, as to the sum to be paid by the insurer, which is in either case to be regulated only by the prime cost or invoice price.

These rules can only apply in cases where there is a specific description of goods; but where the property is of various kinds, an account must be taken of the value of the whole, and the proportion of that as the amount of the goods lost.

When the quantity of damages sustained in the course of the voyage is known, and the amount which each insurer is to pay is settled, it is usual for the underwriter to indorse on the policy, "Adjusted this loss at so much *per cent.*" This is called an adjust-

ment; after which, if the underwriter refuse to pay, the owner has no occasion to go into the proof of his loss, or any of the circumstances, the adjustment being considered as a note of hand. So after judgment by default upon a valued policy, the plaintiff's title to recover is confessed, and the amount of the damage is fixed by the policy. And if a loss be total at the time of the adjustment, and the insurer pay for a total loss, the insured is not obliged to refund, if it should afterwards turn out to be partial; but the insurer will stand in the place of the insured.

Of Salvage and Abandonment.—Salvage is an allowance made for saving a ship or goods, or both, from the dangers of the sea, fire, pirates, or enemies; in which sense it is here used, though it is also sometimes incorrectly applied to signify the thing itself which is saved. And the saver has such a property in the goods saved by his own exertions and danger, that, in action of trover, it has been held, the defendants might retain the goods till payment of the salvage.

In the case of wreck or derelict at sea, the law of England, like the law of some other countries, has fixed no positive rule or rate of salvage, but directs only as a general principle, that a reasonable compensation shall be made.

In the case of a derelict becoming the property of the crown, it was formerly the settled practice of the court of Admiralty to give a moiety to the finders or salvors: but the practice has been long disused, and the reward become discretionary.

In fixing the rate of salvage, the court of Admiralty usually has regard not only to the labour and peril incurred by the salvors, but also to the promptitude and alacrity manifested by them, and to the value of the ship and cargo saved, as well as the degree of danger from which they were rescued. But it will not suffer a claim of salvage to be ingrafted on the local ignorance of foreigners, who cannot be expected to be well acquainted with our coast, although a recompence must be made for the service actually rendered to them. Neither is a passenger entitled to make any claim for the ordinary assistance he may be enabled to afford to the vessel in distress; it being the duty, as well as the interest, of all persons on board, of every description, to contribute their aid on such an occasion.

It is necessary to observe, that wearing apparel of the master and seamen is always excepted from the allowance of salvage. The valuation of a ship and cargo, in order to ascertain the rate of salvage, may be determined by the policies of insurance made on them respectively; if there be no reason to suspect they are undervalued. If there be no policy, the real value must be proved by invoices, &c.

Underwriters, by their policy, expressly undertake to bear all expences of salvage. It is therefore not necessary to state them in a declaration as a special breach of the policy. But if the insurer pay the insured such expences, and from particular circumstances

the loss be replaced by unexpected means, the insurer shall stand in the place of the insured, and receive the sum thus paid to atone for the loss.

Where the salvage is high, and the other expences are great, and the object of the voyage is defeated, the insured is allowed to *abandon* to the insurer, and call upon him to contribute for a total loss.

Abandonment.—Before a person can demand from the underwriter a recompence for a total loss, he must *abandon* to him whatever claims he may have to the property insured; and when the underwriter has discharged his insurance, and the abandonment is made, he stands in the place of the insured, and is entitled to all the advantages resulting from that situation, in case the ship or property, &c. is not totally lost, or is afterwards restored by recapture, &c.

It is now held, that as soon as the insured receive accounts of such a loss as entitles them to abandon, they must, in the first instance, make their election whether they will abandon or not; and if they abandon, they must give the underwriters notice in a reasonable time, otherwise they waive the right to abandon, and can never after recover for a total loss. But if the insured, hearing that the ship is disabled, and has put into port to repair, express his desire to the underwriters to abandon, and be dissuaded from it by them, and they order the repairs to be made, they are liable to the owner for all the subsequent damage occasioned by that refusal, though it should amount to the whole sum insured.

When an abandonment is made, it must be total and not partial. And though the insured may in all cases choose not to abandon, yet he cannot at his pleasure abandon, and thereby turn a partial into a total loss.

We have already observed, that the insured may abandon to the underwriter, and call upon him for a total loss, if the damages exceed half the value; if the voyage be absolutely lost, or not worth pursuing; if further expence be necessary, and the insurer will not engage, at all events, to bear that expence, though it should exceed the value, or fail of success. But he cannot abandon, unless at some period or other of the voyage there has been a total loss. Also, if neither the thing insured nor the voyage be lost, and the damage does not amount to a moiety of the value, he shall not be allowed to abandon.

No capture by the enemy can be so total a loss, as to leave no possibility of a recovery. If the owner himself should retake at any time, he will be entitled, before condemnation or after, to restitution upon stated salvage. This chance does not suspend the demand for a total loss upon the insurer; but justice is done by putting him in the place of the insured, in case of a re-capture. In questions upon policies, the nature of the contract as an indemnity, and nothing else, is always liberally considered. There might be circumstances under which a capture would be but a small temporary hindrance to the voyage, perhaps none at all; as if a ship

were taken, and in a day or two retaken, or escaped entire, and pursued her voyage; under which circumstances it would only be deemed an average loss.

Of Direct Fraud in Policies.

Policies are annulled by the least shadow of *fraud*, or undue concealment of facts. Both parties are therefore equally bound to disclose circumstances within their knowledge, since no contract can be good, unless it be equal; that is, neither side must have an advantage by any means, of which the other is not aware. This being admitted of contracts in general, it holds with double force in those of insurance; because the underwriter computes his risk entirely from the account given by the person insured, and therefore it is absolutely necessary to the justice and validity of the contract, that this account be exact and complete. Accordingly the courts of law have constantly held, that it is vacated and annulled by any the least shadow of fraud or undue concealment; and therefore if the insurer, at the time he underwrites, can be proved to have known that the ship was safe arrived, the contract will be equally void, as if the insured had concealed from him any accident which had befallen the ship.

Cases of fraud upon this subject are liable to a threefold division: 1. The *allegatio falsi*; 2. The *suppressio veri*; 3. *Misrepresentation*. The latter is made a separate head; as, though, if wilful, it is a direct fraud, yet, if it happen by mistake, if in a material point, it will equally vitiate the policy.

As to the first point, *viz.* the *allegatio falsi*, several cases have determined that the policy should be void, where goods, &c. are insured as the property of an ally, or as neutral property, when in fact they are the goods of an enemy and such false assertions in a policy will vitiate the contract, though the loss happen in a mode not affected by that falsity.

The second species of fraud, *viz.* the *suppressio veri*, or concealment of circumstances, vitiates all contracts of insurance. The facts upon which the risk is to be computed, lie for the most part within the knowledge of the insured only. The underwriter relies upon him for all necessary information, and must trust to him that he will conceal nothing, so as to make him form a wrong estimate: on this ground, where one having an account that a ship described like his was taken, insured his own ship, without giving any notice to the insurers of what he had heard, the policy was decreed in equity to be delivered up.

The policy is void, if the broker conceal any *material* circumstances, though the only ground for not mentioning them should be, that the facts concealed appeared immaterial to him.

But the thing concealed must be some *fact*, not a mere *speculation or expectation* of the insured. In short, the question, in cases of concealment, must always be, "whether there was, under all the circumstances, at the time the policy was underwritten, a fair statement or concealment—fraudulent, if designed, or, if not de-

signed, varying *materially* the object of the policy, and changing the risk understood to be run."

A *representation* is a state of the case, not forming a part of the written instrument or policy, as a warranty does. Therefore, if there be a misrepresentation, it will avoid the policy as a fraud, but not as a part of the agreement, as in case of warranty. And if a representation be false in any *material* point, even through mistake, it will avoid the policy, because the underwriter has computed the risk upon circumstances which did not exist.

In all these causes of fraud, wherever there has been an allegation of falsehood, a concealment of circumstances, or a misrepresentation, it is immaterial whether it be the act of the person himself who is interested, or of his agent; for in either case the contract is founded in deception, and the policy is consequently void. And this rule prevails, even though the act cannot be at all traced to the owner of the property insured.

A policy will not, however, be set aside on the ground of fraud, unless it be *fully* and *satisfactorily* proved; and the burden of proof lies on the persons wishing to take advantage of the fraud. Thus, if the insured is supposed to be guilty of fraud, the proof of it falls upon the underwriter, because he is the person who is to derive a benefit from substantiating the charge.

But although it has been said that fraud will not be presumed, unless it be *fully* and *satisfactorily* proved, it is not intended to convey an idea, that there must be a *positive* and *direct* proof of fraud, in order to annul the contract. The nature of the thing itself, which is generally carried on in a secret and clandestine manner, does not admit of such evidence; and therefore, if no proof but that of actual fraud were allowed in such cases, much mischief and villainy would ensue, and pass with impunity. Circumstantial evidence is all that can be expected; and indeed all that is necessary to substantiate such a charge.

Upon this principle it has been held, that the assured cannot recover on a policy of insurance, unless they make a full disclosure of all the circumstances of the intended voyage, even with respect to the tract the ship intends to take.

By 1 Ann. stat. 2. c. 9. § 4. it is enacted, that if any captain, master, mariner, or other officer belonging to any ship, shall wilfully cast away, burn, or otherwise destroy the ship unto which he belongeth, or procure the same to be done, to the prejudice of the owners thereof, or of any merchant or merchants that shall load goods thereon, (or by 4 Geo. I. c. 12. § 3. to the prejudice of any person or persons that shall underwrite any policy or policies of insurance thereon) he shall suffer death as a felon; and the benefit of clergy is taken away by 11 Geo. I. c. 29. These statutes are still further enforced by the 43 Geo. III. c. 113.

Of Changing the Ship.

Of those causes which will operate as a bar to the insured's recovering upon a policy of insurance against the underwriter, the first to be mentioned is that of changing the ship, or, as it has

commonly been called, changing the bottom. It being requisite, to render a policy of insurance effectual, that the name of the ship on which a risk was to be run should be inserted; it follows as an implied condition, that the insured shall neither substitute another ship for that mentioned in the policy before the voyage commences (in which case there would be no contract at all), nor during the course of the voyage remove the property insured to another ship, without the consent of the underwriters, or without being impelled by a case of unavoidable necessity. If he do, the implied condition is broken, and he cannot recover a satisfaction, in case of a loss, from the insurer; because the policy was upon goods on board a particular ship, or upon the ship itself: and it becomes a material consideration, in a contract of insurance, upon what vessel the risk is to be run; since the one may be much stronger, and more able to resist the perils of the sea, or by its swift sailing, much better able to escape from the pursuit of an enemy, than the other.

Of Deviation in the Voyage.

Deviation, in marine insurances, is understood to mean a voluntary departure, without necessity or any reasonable cause, from the regular and usual course of the specific voyage insured. Whenever a deviation of this kind takes place, the voyage is determined, and the underwriters are discharged from any responsibility. It is necessary, as we have seen, to insert in every policy of insurance, the place of the ship's departure, and also of her destination. Hence it is an implied condition to be performed on the part of the insured, that the ship shall pursue the most direct course, of which the nature of things will admit, to arrive at the destined port. If this be not done, if there be no special agreement to allow the ship to go to certain places out of the usual track; or if there be no just cause assigned for such a deviation; it is but just and reasonable, that the underwriter should no longer be bound by his contract, the insurer having failed to comply with the terms on which the policy was made. For if the voyage be changed after the departure of the ship, it becomes a different voyage, and not that against which the insurer has undertaken to indemnify (which is the true objection to a deviation); the risk may be ten times greater, which probably the insurer would not have run at all, or at least would not, without a larger premium. Nor is it at all material, whether the loss be or be not an actual consequence of the deviation; for the insurers are in no case answerable for a subsequent loss, in whatever place it happen, or to whatever cause it may be attributed. Neither does it make any difference, whether the insured was, or was not, consenting to the deviation.

Wherever the deviation is occasioned by absolute necessity, as where the crew force the captain to deviate, the underwriters continue liable. And the general justifications for a deviation seem to be these: to repair the vessel, to avoid an impending storm, to escape from an enemy, or to seek convey.

If therefore a ship is decayed, or hurt by a storm, and goes to the nearest port to refit, it is no deviation, because it is for the general interest of all concerned. So whenever a ship, in order to escape a storm, goes out of the direct course, or when, in the due course of the voyage, she is driven out of it by stress of weather, this is no deviation. And if a storm drive a ship out of the course of her voyage, and she do the best she can to get to her port of destination, she is not obliged to return to the point from which she was driven.

A deviation may be justified, if done to avoid an enemy, or seek the convoy; because it is in truth no deviation, to go out of the course of a voyage, in order to avoid a danger, or to obtain a protection against it, if in all cases the master of a ship act fairly and *bonâ fide*, according to the best of his judgment.

A deviation *merely intended*, but never carried into effect, does not discharge the insurers; and whatever loss happens before actual deviation or the dividing point of the voyage, falls upon the underwriters. But if it can be shewn that the parties never intended to sail upon the voyage insured, if all the ship's papers be made out for a different place, the insurer is discharged, though the loss should happen before the dividing point of the two voyages. And in all cases, deviation or not is a question of fact, to be decided subject to the above rules, according to the circumstances of the case.

Of Sea-Worthiness.

Upon this point it has been determined, that every ship insured must, at the time of the insurance, be able to perform the voyage, unless some external accident should happen; and if she have a latent defect, wholly unknown to the parties, that will vacate the contract, and the insurers are discharged.

There is, in the contract of insurance, a tacit and implied agreement, that every thing shall be in that state and condition in which it ought to be: and therefore it is not sufficient for the insured to say, that he did not know that the ship was not sea-worthy; for he *ought* to know that she was so, at the time he made the insurance. The ship is the *substratum* of the contract between the parties. A ship not capable of performing the voyage is the same as if it were no ship at all; and although the defect may not be known to the person insured, yet the very foundation of the contract being gone, the law is clearly in favour of the underwriter; because such defect is not the consequence of any external misfortune, or any unavoidable accident, arising from the perils of the sea, or any other risk against which the underwriter engages to indemnify the person insured.

The whole doctrine of *sea-worthiness* was settled in the case of the *Mills* frigate, where the insurance was upon a ship which had a latent defect totally unknown to the parties: and it was held, that the insurers were not liable, because the ship was not sea-worthy, and that however innocent or unfortunate the insured might be,

yet if the ship be not sea-worthy at the time of insuring, there is no contract at all between the parties; because the very foundation of the contract, the *ship*, was in the same condition as if it did not exist: and the doctrine is the same in insurance upon goods, as when it is upon the ship itself.

The assured cannot recover upon a policy of insurance, unless they equip the ship with every thing necessary in her navigation during the voyage; and therefore they cannot recover, if there be no pilot on board.

Of Wager Policies.

Upon wager policies, *interest or no interest*, the performance of the voyage in a reasonable time and manner, and not the bare existence of the ship and cargo, is the object of insurance. But wager policies being contradictory to the real nature of an insurance, which is a contract of indemnity, seem to have been originally bad; because insurances were invented for the benefit of trade, and not that persons unconcerned or uninterested should profit by them.

The great distinction between *interest* and *wager policies* was, that in the former, the insured recovered for the loss actually sustained, whether it was a total or partial loss; in the latter, he never could recover but for a total loss. At length it was found, that the indulgence given to these fictitious, or, to speak more plainly, gambling policies, had increased to such an alarming degree, as to threaten the very annihilation of that security which it was the original intent of insurances to introduce.

Accordingly the 19 Geo. II. c. 37. was passed, entitled, "An act to regulate insurance on ships belonging to the subjects of Great Britain, and on merchandises or effects thereon;" the preamble to which states, that, "Whereas it hath been found by experience, that the making assurances, interest or no interest, or without further proof of interest than the policy, hath been productive of many pernicious practices, whereby a great number of ships, with their cargoes, have either been fraudulently lost and destroyed, or taken by the enemy in time of war; and such assurances have encouraged the exportation of wool, and the carrying on many other prohibited and clandestine trades, which by means of such assurances have been concealed, and the parties concerned secured from loss, as well to the diminution of the public revenue, as to the great detriment of fair traders; and by introducing a mischievous kind of gaming or wagering, under the pretence of assuring the risk on shipping and fair trade, the institution and laudable design of making assurances hath been perverted; and that which was intended for the encouragement of trade and navigation has, in many instances, become hurtful of and destructive to the same; for remedy whereof it is enacted, that no assurance or assurances shall be made by any person or persons, bodies corporate or politic, on any ship or ships belonging to his majesty, or any of his subjects, or on any goods, merchandises, or effects, laden or to be laden on board of any such ship or ships, *interest or no interest*,

or without further proof of interest than the policy, or by way of gaming or wagering, or without benefit of salvage to the assurer; and that every such insurance shall be null and void to all intents and purposes."

But assurance on private ships of war, fitted out by any of his majesty's subjects solely to cruise against his majesty's enemies, may be made by or for the owners thereof, interest or no interest, free of average, and without benefit of salvage to the assurer. § 2.

And any merchandizes or effects from any ports or places in Europe or America, in the possession of the crowns of Spain or Portugal, may be assured in such way and manner as if this act had not been made. § 3.

And it is further enacted, that it shall not be lawful to make re-assurance, unless the assurer should be insolvent, become bankrupt, or die; in either of which cases, such assurer, his executors, administrators, or assigns, might make a re-assurance, to the amount by him before assured, provided it should be expressed in the policy to be a re-assurance. § 4.

And all and every sum and sums of money to be lent on bottomry, or at respondentia, upon any ship or ships belonging to any of his majesty's subjects bound to or from the East Indies, shall be lent only on the ship, or on the merchandize or effects laden or to be laden on board of such ship, and shall be so expressed in the condition of the said bond; and the benefit of salvage shall be allowed to the lender, his agents or assigns, *who alone shall have a right to make assurance on the money so lent*: and no borrower of money on bottomry or respondentia, as aforesaid, shall recover more on any assurance than the value of his interest in the ship, or in the merchandizes or effects laden on board such ship, exclusive of the money so borrowed; and in case it shall appear, that the value of his share in the ship, or in the merchandizes or effects laden on board, doth not amount to the full sum or sums he hath borrowed as aforesaid, such borrower shall be responsible to the lender for so much of the money borrowed as he hath not laid out on the ship or merchandize laden thereon, with the lawful interest for the same, together with the assurance, and all other charges thereon, in the proportion the money not laid out shall bear to the whole money lent, notwithstanding the ship and merchandizes be totally lost. § 5.

Upon this last section it may be sufficient in this place to observe, that none but the lender shall have a right to make insurance on the money lent. This regulation of insurance on bottomry or respondentia interest, extends only to East-India ships: and therefore an insurance of a respondentia interest upon any other ships may be made in the same manner as they used to be before this act. It has also been decided upon this clause of the act, that it never meant or intended to make any alteration in the manner of insurances: and it was declared by the whole court, in *Glover v. Black*, to be the established law and usage of merchants, that respondentia and bottomry must be mentioned and specified in the policy of insurance.

Of Valued Policies.

A *valued policy* is not a wager-policy: it originates from the circumstances of its being sometimes troublesome to the trader to prove the value of his interest, or the insurer a higher premium, to agree to estimate his interest at a sum certain. In this case the insured must prove some interest, although he need not prove the value of his interest. But if a valued policy were used merely as a cover to a wager, in order to evade the statute, it would be void.

It has been settled that, upon a joint capture by the army and navy, the officers and crews of the ships, before condemnation, have an insurable interest, by virtue of the Prize Act which usually passes at the commencement of a war.

All contracts of insurance made by persons having no interest in the event about which they insure, or without reference to any property on board, are merely wagers, and as such void. And wherever the court can see, upon the face of the policy, that it is merely a contract of gaming, where indemnity is not the object in view, they are bound to declare such policy void.

In the case of a valued policy, on both ship and cargo, the assured must recover the whole sum underwritten, because he could not have any claim for a return of premium for short interest, if the ship had arrived safe.

Of Illegal Voyages.

Whenever an insurance is made on a voyage expressly prohibited by the common, statute, or maritime law of the country, the policy is void *ab initio*.

If a ship, though neutral, be insured on a voyage prohibited by an embargo, laid on in time of war by the prince of the country in whose port the ship happens to be, such an insurance is void. This, however, depends upon the power of an embargo, the right of laying on which in time of war is undoubted, although in time of peace the power of the king in such a measure may be a different question.

The trading with an enemy in time of actual war, even through the medium of neutral ships, is illegal; as is the insurance of enemy's property.

There is one species of insurance which never could be made upon the ships or goods of an enemy, or even of a subject, and that is, upon a voyage to a besieged fort or garrison, with a view of carrying assistance to them; or upon ammunition, other war-like stores, or provisions; because, from the nature of these commodities, they are absolutely prohibited by the laws of all nations.

Thus, all insurances upon a voyage generally prohibited by law, such as to an enemy's garrison, or upon a voyage directly contrary to an express act of parliament, or to royal proclamation, in time of war, are absolutely null and void.

Of Prohibited Goods and Commerce.

All insurances made to protect the importation or exportation of certain commodities declared to be illegal, are contrary to law, and therefore void ; and no insurance, although made in general terms, can comprehend prohibited goods ; and therefore when the assured shall procure such commodities to be shipped, *the underwriter bring ignorant of it*, by means of which the ship and cargo are confiscated, the insurer is discharged.

Of Return of Premium.

In all countries in which insurances have been known, it has been a custom coeval with the contract itself, that where property has been insured to a larger amount than the real value, the insurer shall return the overplus premium ; or if it happen that goods are insured to come in certain ships from abroad, but are not in fact shipped, the premium shall be returned. If the ship be arrived before the policy is made, and the underwriter is acquainted with the arrival, but the insured is not, it should seem, the latter will be entitled to have his premium restored, on the ground of fraud. But if both parties be ignorant of the arrival, and the policy be (as it usually is) *lost or not lost*, it has been held, in that case, the underwriter should retain : because under such a policy, if the ship had been lost at the time of subscribing, he would have been liable to pay the amount of his subscription. The parties themselves frequently insert clauses in the policy, stating, that upon the happening of a certain event, there shall be a return of premium. These clauses have a binding operation upon the parties ; and the construction of them is a matter for the court, and not for the jury to determine. In short, if the ship or property insured was never brought within the terms of the written contract, so that the insurer never has run any risk, the premium must be returned.

The principle upon which the whole of this doctrine depends, is simple and plain, admitting of no doubt or ambiguity. The risk or peril is the consideration for which the premium is to be paid : if the risk be not run, the consideration for the premium fails ; and equity implies a condition, that the insurer shall not receive the price of running a risk, if, in fact, he runs none.

It is just like a contract of bargain and sale ; for if the thing sold be not delivered, the party who agreed to buy, is not liable to pay. Thus, to whatever cause it be owing that the risk is not run, as the money was put into the hands of the insurer, merely for the risk of indemnifying the insured, the purpose having failed, he cannot have a right to retain the sum so deposited for a special cause ; and should he refuse to refund such premium, the law in such case implies a debt, *quasi ex contractu*, and gives the insured an action against the insurer, for money had and received to his use, to recover back the premium.

It is held, that whether the cause of the risk not being run is

attributable to the *fault, will, or pleasure* of the insured, the premium is to be returned. But if the risk has once commenced, there shall be no apportionment or return of premium afterwards; therefore no return in deviations.

And where a policy is void as a wager policy, the insured will not be allowed to recover back the premium.

Nor in the case of a re-assurance, void by the statute of the 19 Geo. II. c. 37.

And where a policy is made to cover a *trading with the enemy*, the insurance is void, and the assured cannot recover the premium.

But if there are two distinct points of time, or in effect, two voyages, either in the contemplation of the parties, or by the usage of trade, and only one of the two voyages was made, the premium shall be returned on the other, though both are contained in one policy.

When the contract is entire, whether it be for a specified time, or for a voyage, there shall be no apportionment or return, if the risk has once commenced. Where the premium is entire in a policy on the voyage; where there is no contingency at any period out or home, upon the happening of which the risk is to end, nor any usage established upon such voyage; though there be several distinct ports, at which the ship is to stop, yet the voyage is one, and no part of the premium shall be recoverable.

If the insured have a contingent insurable interest in the thing insured, at the time when the policy is effected, and the risk be once begun, there shall be no return of premium, though it should eventually turn out that he had no title to the thing insured.

A premium once paid upon an illegal insurance, cannot be recovered back.

OF BOTTOMRY AND RESPONDENTIA.

The contract of bottomry is in the nature of a mortgage of a ship, when the owner of it borrows money to enable him to carry on the voyage, and pledges the keel or *bottom* of the ship, as a security for the repayment; and it is understood, that if the ship be lost, the lender also loses his whole money; but if it return in safety, then he shall receive back his principal, and also the premium or interest stipulated to be paid, however it may exceed the usual or legal rate of interest. When the ship and tackle are brought home, they are liable, as well as the person of the borrower for the money lent. But when the loan is not made upon the vessel, but upon the goods and merchandize laden thereon, which from their nature must be sold or exchanged in the course of the voyage, then the borrower only is *personally* bound to answer the contract; who, therefore, in this case, is said to take up money at *respondentia*. In this consists the difference between *bottomry* and *respondentia*, that the one is a loan upon the ship,

the other upon the goods; in the former, the ship and tackle are liable, as well as the person of the borrower; in the latter, for the most part, recourse must be had to the *person* only of the *borrower*. Another observation is, that in a loan upon bottomry, the lender runs no risk, though the goods should be lost; and upon respondentia, the lender must be paid his principal and interest, though the ship perish, provided the goods are safe. But in all other respects, the contract of bottomry, and that of respondentia, are upon the same footing; the rules and decisions applicable to one are applicable to both.

The contract of bottomry and respondentia seems to deduce its origin from the custom of permitting the master of a ship, when in a foreign country, to hypothecate the ship, in order to raise money to refit. Such a permission is absolutely necessary, and is impliedly given in the very act of constituting him master, not indeed by the common law, but by the marine law, which in this respect is reasonable; for if a ship happen to be at sea, and spring a leak, or the voyage is likely to be defeated for want of necessaries, it is better that the master should have it in his power to pledge the ship and goods, or either of them, than that the ship should be lost, or the voyage defeated. But he cannot do either for any debt of his own; but merely in case of necessity, and for completing the voyage. Although the master of the vessel has this power while abroad, because it is absolutely necessary for purposes of commerce and navigation; yet the very same authority which gave that power in those cases, has denied it when he happens to be in the same place where the owners reside.

The contract of which we treat is of a different nature from almost all others. But that which it most resembles is the contract of insurance: for the lender on bottomry, or at *respondentia*, runs almost the same risks, with respect to the property on which the loan is made, that the insurer does with respect to the effects insured. There are, however, some considerable distinctions: for instance, the lender supplies the borrower with money to purchase those effects upon which he is to run the risk; not so with the insurer. There are also various other distinctions.

In defining bottomry, it has been said, that if the ship arrive safe, the lender shall be paid his principal, and the stipulated interest due upon it, however much it exceed the legal rate. The true principle upon which this is allowed, is not merely the great profit and convenience of trade, as has frequently been urged; but the risk which the lender runs of losing both principal and interest; for he runs the contingency of winds, seas, and enemies. It is therefore of the essence of a contract of bottomry, that the lender runs the risk of the voyage; for that both principal and interest be at hazard: and if the risk go only to the interest or premium, and not to the principal also, though a real and substantial risk be inserted, it is a contract against the Statute of Usury, and therefore void.

If a contract were made by colour of bottomry, in order to evade the statute of usury, it would unquestionably be usurious and void.

And as the hazard to be run is the very basis and foundation of this contract, it follows, that if the risk is not run, the lender cannot be entitled to the extraordinary premium; for that would be to open a door to means by which the statutes of usury might be evaded.

Bottomry bonds generally express from what time the risk shall commence, as that the ship shall sail from London to such a port abroad, &c. In such cases the contingency does not commence till the departure; and therefore if the ship receive injury by storm, fire, &c. before the beginning of the voyage, the person borrowing alone runs the hazard. But if the condition be, "that if the ship should not arrive at such a place by such a time, then, &c." in these instances the contract commences from the time of sailing, and a different rule, as to the loss, will necessarily prevail.

The amount of the loan on bottomry or respondentia, in England, is not restrained by any regulation whatever; although it is in many maritime states, by express ordinances: the only restriction in the laws of England is, with respect to money lent on ships and goods going to the East Indies, which, by 19 Geo. II. c. 37. must not exceed the value of the property on which the loan is made. It remains then to see what those risks are, to which the lender undertakes to expose himself. These are for the most part mentioned in the condition of the bond, and are nearly the same against which the underwriter in a policy of insurance undertakes to indemnify. These accidents are tempests, fire, capture, and every other misfortune, except such as arise either from the defects of the thing itself on which the loan is made, or from the misconduct of the borrower.

The lender is answerable likewise for losses by capture; or, to speak more accurately, if a loss by capture happen, he cannot recover against the borrower. But in bottomry and respondentia bonds, capture does not mean a mere temporary taking, but it must be such a capture as to occasion a total loss. And therefore, if a ship be taken and detained for a short time, and yet arrive at the port of destination within the time limited (if time be mentioned), the bond is not forfeited, and the obligee may recover.

By 19 Geo. II. c. 32. it is enacted, "That the obligee in any bottomry or respondentia bond, made and entered into upon a good and valuable consideration, *bonâ fide*, shall be admitted to claim, and, after the contingency shall have happened, to prove his or her debt or demands in respect of such bonds, in like manner as if the contingency had happened before the time of the issuing the commission of bankruptcy against the obligor, and shall be entitled unto, and shall have and receive a proportionable part, share, and dividend of such bankrupt's estate, in proportion to the other creditors of such bankrupt, in like manner as if such contingency had happened

before such commission issued: and that all and every person or persons against whom any commission of bankruptcy shall be awarded, shall be discharged of and from the debt or debts owing by him, her, or them, on every such bond as aforesaid, and shall have the benefit of the several statutes now in force against bankrupts, in like manner, to all intents and purposes, as if such contingency had happened, and the money due in respect thereof had become payable before the time of the issuing of such commission."

By 16 Car. II. c. 6. § 12. it is enacted, "That if any captain, master, mariner, or other officer belonging to any ship, shall wilfully cast away, burn, or destroy the ship unto which he belong, or procure the same to be done, he shall suffer death as a felon;" which statute was made perpetual by the 21 & 22 Car. II. c. 11. § 12.

As the commerce of the country increased to an amazing degree, so the custom of lending money on bottomry became also very prevalent. And as the lenders had subjected themselves to great risks, they began to think it necessary to protect their property, by insuring to the amount of the money lent. By the decision of the case of *Glover v. Black*, however, it became necessary to insert in the policy, that the interest insured was bottomry or respondentia: and such is the law and practice of merchants at this time.

OF INSURANCE UPON LIVES.

An insurance upon life is a contract, by which the underwriter, for a certain sum, proportioned to the age, health, profession, and other circumstances of the person whose life is the object of insurance, engages that that person shall not die within the time limited in the policy; or if he do, that he will pay a sum of money to him in whose favour the policy was granted. Thus, if A lend 100*l.* to B, who can give nothing but his personal security for repayment; in order to secure him in case of his death, B applies to C, an insurer, to insure his life in favour of A; by which means if B die within the time limited in the policy, A will have a demand upon C for the amount of his insurance.

In order to prevent gambling transactions in insurances on lives, it is enacted by 14 Geo. III. c. 48. that no insurance shall be made by any person or persons, bodies politic or corporate, *on the life or lives* of any person or persons, or on any other event or events whatsoever, wherein the person or persons for whose use, benefit, or on whose account such policies shall be made, shall have *no interest, or by way of gaming or wagering*: and every insurance made contrary to the true intent and meaning thereof, shall be null and void to all intents and purposes. And in order more effectually to guard against any imposition or fraud, and to be the better able to ascertain what the interest of the person entitled to the insurance really is, it is further enacted,

“ that it shall not be lawful to make any policy or policies on the life or lives of any person or persons, or other event or events, without inserting in such policy or policies the person's name interested therein, or for whose use, benefit, or on whose account, such policy was so made or underwrote. And that in all cases where the insured has an interest on such life or lives, event or events, no greater sum shall be recovered or received from the insurer or insurers than the amount or value of the interest of the insured in such life or lives, or other event or events.”

It has been held, that a person holding a note given for money won at play, has not an insurable interest in the life of the maker of the note.

The rules and observations on insurances upon lives may be comprised in a very short compass: because those general rules and maxims upon which so much has been said with regard to insurances in general, are also applicable to this species of them; the same mode of construction is to be adopted; fraud will equally affect the one as the other; the same attention must be paid to a rigid compliance with warranties; and the same rules of proceeding are to be followed.

With respect to the risk which the underwriter is to run, this is usually inserted in the policy; and he undertakes to answer for all those accidents to which the life of man is exposed, unless the *cestuy qui vie* puts himself to death, or he die by the hand of justice. The policy, as to the risk, generally runs in these words: “ The said insurers, in consideration of the sum paid, do assure, assume, and promise, that the said A.B. shall, by the permission of Almighty God, live and continue in this natural life for and during the said term; or in case he the said A.B. shall, during the said time, or before the full end and expiration thereof, happen to die by any ways or means whatsoever, suicide or the hands of justice excepted, then, &c.” We see that this contract expressly says, that the death must happen within the time limited, otherwise the insurers are discharged. But suppose a *mortal wound* is received during the existence of the policy, and the person languishes till after the term limited in the contract, what says the law? Agreeably to the decision of this point, in cases of marine insurances, not only the cause of the loss, but the loss itself, must actually happen during the time named in the policy, otherwise the insurers are not responsible. This very case was put by Mr. Justice Willis, in his argument, when delivering the opinion of the court, in the case of *Lockyer v. Offley*. Suppose, said the learned judge, an insurance upon a man's life for a year, and some short time before the expiration of the term he receive a mortal wound of which he dies after the year, the insurer would not be liable. But when an insurance is made upon a man's life who goes to sea, and the ship in which he sailed was never afterwards heard of, the question whether he did or did not die within the time insured, is a fact for the jury to ascertain from the circumstances which shall be produced in evidence.

These insurances, when a loss happens upon them, must be paid according to the tenor of the agreement in the *full sum* insured, as this sort of policy, from the nature of it, being on the life or death of man, does not admit of the distinction between total and partial losses.

It became a doubt in the reign of King William, when a policy on a life was to run from the day of the date thereof till that day twelvemonth, and the person died on the day named, whether the insurer was liable. The court held that he was. The case was this:—A policy of insurance was made to insure the life of Sir Robert Howard for one year from the day of the date thereof: the policy was dated on the 3d of September, 1697. Sir Robert died on the 3d of September, 1698, about one o'clock in the morning. Lord Holt held, that *from the day of the date* excludes the day, but *from the date* includes it; so that the day of the date must be excluded here, and the underwriter is liable.

In policies of insurance upon lives, it is usual, in order to prevent disputes, to insert "*the first and last days included.*"

Policies on lives are equally vitiated by fraud or falsehood, as those on marine insurances; because they are equally contracts of good faith, in which the underwriter from necessity must rely upon the integrity of the insured for the statement of circumstances.

Where there is an express warranty, that the person is in good health, it is sufficient that he is in a reasonable good state of health; for it can never mean, that the *cestuy qui vie* is perfectly free from the seeds of disorder. Nay, even if the person, whose life was insured, laboured under a particular infirmity, if it can be proved by medical men, that it did not at all, in their judgment, contribute to his death, the warranty of health has been fully complied with, and the insurer is liable.

In these as well as in marine insurances, when the risk is entire, and it is once begun, there shall be no apportionment or return of premium, though it should cease the very next day after it commenced; for the contract is entire. And if the person whose life is insured, should put an end to it the next day, or should be executed, after the risk commences, though the underwriter is discharged, there would be no return of premium.

OF INSURANCE AGAINST FIRE.

An insurance against fire is a contract by which the insurer, in consideration of the premium which he receives, undertakes to indemnify the insured against all losses which he may sustain in his house or goods by means of fire, within the time limited in the policy. Some of the Societies for the purpose of insuring property against fire, have been instituted by Royal Charter; others, by deed enrolled; and others give security upon land, for the payment of losses. The rules by which these societies are governed, are established by their own managers, and a copy given to every person

at the time he insures; so that by his acquiescence he submits to their proposals, and is fully apprised of those rules upon the compliance or non-compliance with which he will or will not be entitled to an indemnity.

The construction to be put upon those regulations has but seldom become the subject of a judicial inquiry. In the proposals of the London Assurance and some of the other offices, there is a clause by which it is provided, that they do not hold themselves liable for any loss or damage by fire happening by any invasion, foreign enemy, or *any military or usurped power* whatsoever. It became a question, what species of insurrection should be deemed a military or usurped power within the meaning of this proviso. It was held by the Court of Common Pleas, against the opinion of Mr. Justice Gould, that it could only mean to extend to houses set on fire by means of an invasion from abroad, or of an internal rebellion, when armies are employed to suppress it.

An action was brought on a policy of insurance, to recover from the Sun Fire-Office a satisfaction for damage done to the plaintiff's house and goods by the rioters, in June 1780. As the circumstances of these riots were very recent, they were not very minutely gone into at the trial. It was, however, sufficiently proved, that the plaintiff on account of his religion (being a Roman Catholic) had been, amongst others, selected as an object of the rage of the times, and that his houses and effects were set on fire. The office defended this action, considering that they were protected by this article, namely—"That they would not answer for any loss occasioned by any invasion, foreign enemy, *civil commotion*, or any military or usurped power whatever." This point was argued much at length by the counsel on both sides. It was held, however, that this was a case coming under the description of a *civil commotion*, and a verdict was accordingly found for the defendants.

In a policy of insurance against loss by fire from half year to half year, the insured agreed to pay the premium half yearly "as long as the assurers should agree to accept the same *within fifteen days after the expiration of the former half year*;" and it was also stipulated that no insurance should take place till the premium was actually paid; a loss happened within fifteen days after the end of one half year, but before the premium for the next was paid; and it was held that the assurers were not liable, though the assured tendered the premium before the end of fifteen days, but after the loss.

The defendants in the above cause were members of a society at Liverpool for the insurance of property from fire. But soon after the decision, the Royal Exchange Assurance Company, the Phoenix, and some other Insurance Companies, gave notice, that they did not mean to take advantage of the judgment so pronounced, but would hold themselves liable for any loss during the 15 days that were allowed for the payment of the insurance, upon annual policies, and all other policies of a longer period. But that policies for a shorter period than a year would cease at six o'clock in the evening of the day mentioned in the policy.

When a fire happens, and the party sustains a loss in consequence of it, he is bound, by the printed proposals of most of the societies, to give immediate notice thereof to the office in which he is insured; and as soon as possible afterwards, or within a limited time according to the regulations of some, to deliver in as particular an account of his loss or damage, as the nature of the case will admit; and make proof of the same by his oath or affirmation, by books of account, or such other vouchers as shall be required, or as shall be in existence. It is also necessary that the insured shall procure a certificate under the hands of the ministers and churchwardens, together with some other reputable inhabitants of the parish not concerned in such loss, importing that they are well acquainted with the character and circumstances of the sufferer or sufferers; and do know, or verily believe, that he, she, or they have, really and by misfortune, sustained by such fire the loss and damage therein-mentioned.

As insurance against fire is a contract of indemnity, the end of the contract is answered by putting the party in the same situation, in case of fire, in which he was before the accident happened. For if he were to recover the whole sum insured, he would be in a better situation, which the law will not allow. Indeed, from the printed proposals of the offices, it is evident that they consider themselves liable for partial losses. Nay, some of them, if not all, expressly undertake to allow all reasonable charges attending the removal of goods, in case of fire, and to pay the sufferers' loss, where the goods are destroyed, lost, or damaged by such removal.

Policies of insurance against fire are not in their nature assignable, for they are only contracts to make good the loss which the contracting party himself shall sustain; nor can the interest in them be transferred from one person to another, without the consent of the office.

There is a case, however, in which, by the proposals, these policies are allowed to be transferred, and that is, when any person dies, the policy and interest therein shall continue to the heir, executor, or administrator respectively, or to whom the property insured shall belong; provided, before any new payment be made, such heir, executor, or administrator, do procure his or her right to be indorsed on the policy at the said office, or the premium be paid in the name of the said heir, executor, or administrator. But in all other cases, there can be no assignment: and the party claiming an indemnity must have an interest in the thing insured at the time of the loss.

In the body of the policy, the offices acknowledge the receipt of the premium at the time of making the insurance; and by the printed proposals it is expressly stipulated, that no insurance shall take place till the premium be actually paid by the insured, his, her, or their agent or agents.

THE EXCISE LAWS.

It is not intended under this division of our work to embrace the whole of the Excise Laws, but only such part of them as have a general application. Were we to adopt a different course, the subject would be far too voluminous for this work, and would besides be of little or no use to the general reader. Persons engaged in those branches of trade and commerce which come under the inspection of the excise are naturally well acquainted with the laws and regulations applicable to their respective callings; and, as far as regards such laws, any information we could give would be as superfluous to them as they would be unimportant to the public. But many of the laws and regulations of excise are of general import, and it is of such we mean to treat, they being no less important to be known by almost all persons engaged in trade than for the public generally. To these latter our attention will be wholly directed; and we trust we shall omit none that may be either useful or important to be known.

Head Office.

By 12 Car. II. one head-office shall be erected and continued in the city of London, or within ten miles thereof, from time to time, as long as his majesty shall think fit, unto which all the other offices in England, Wales, and the town and port of Berwick, shall be subordinate and accountable.

And in all parts of the cities of London and Westminster, borough of Southwark, and the several suburbs, parishes within the weekly bills of mortality, and the parish of St. Mary-le-bone, shall be under the immediate care, inspection, and management of the said head office.

And by 15 Car. II. c. 11. § 10. the commissioners, farmers, or sub-commissioners of excise, shall appoint, under their hands and seals, a person in every market-town, to be there on every market-day, in some public place, for receiving of entries and duties of excise, and for performing all other matters and things touching the said duties; and the person so appointed shall attend at such office every market-day (the place where it is to be kept being on the next market-day after the appointment published in full and open market), and keep it open from nine till twelve o'clock in the morning, and from two till five in the afternoon; and in case such office shall not be so kept and attended, the commissioners, farmers, sub-commissioners, or others, for their neglect or refusal, shall

for every market-day forfeit 10*l.* one half to the king, and the other to him that will inform or sue for the same.

And as there is but one market-town in the county of Anglesey, there shall be offices kept for making entries and payments in the towns of Holyhead, Newborough, Llanerchthmeth, as well as in the town of Beaumaris.

The office of excise, in all places where it is appointed, must be kept open from eight o'clock in the morning till two in the afternoon.

And the chief office from eight in the morning until three in the afternoon.

Any person coming to a market-town to make the entries and payments required by 12 Car. II. and who shall prove the tender thereof by the oath of a sufficient witness, shall not be liable to the penalties for not making weekly or monthly entries or payments.

No holidays are allowed to be kept at the chief office, or at any other office of excise, except Christmas-day, Good Friday, general fast or thanksgiving days, the restoration day, the coronation-day, and the birth-days of his Majesty and the Prince of Wales.

If, upon trial of any action relating to the duties of excise, any question is made concerning the keeping of an office, proof of the actual keeping thereof before and at the time of question, without producing any one to prove the names of the commissioners in the commission to be of their own hand-writing, will be sufficient.

Legal Entry.

Any entry made of any shop, warehouse, room, place, or utensil, to be made use of for carrying on any trade subject to the survey of the officers of excise, shall not be deemed a legal entry, unless made in the name of the real owner and trader in such shop or place; and the person who shall act as visible owner, or principal manager, shall be deemed the real owner or trader, and be subject and liable as such to all duties, penalties, and forfeitures; and all goods and utensils found in such shops or places, shall be subject to and charged with such duties, penalties, and forfeitures. 18 Geo. II. c. 26. § 8.

By 58 Geo. III. c. 65. § 7. every person making entry, or required to make entry, of any building, place, or utensil, under any law relating to the excise, for using the same in carrying on any trade or business subject to the survey of the officers of excise, shall, in such entry, distinguish and describe every such building, place, and utensil, by a particular letter or number, and paint the same in a large and distinct character upon some convenient and conspicuous part of the walls or doors of each building or place, and upon some convenient and conspicuous part of each utensil, and keep the same so painted, and when occasion may require, or when requested by the supervisor of the district, renew the same, so long as the entry thereof remains uncanceled.

Wherever any such person shall use or employ in his entered buildings or places any fixed pipe, he shall, at making his entry,

deliver therewith a drawing or description, shewing or explaining the course, direction, construction, and use of such pipe, and every branch thereof, and of every cock thereon, with the places and utensils from and to or with which the same leads or communicates. § 7.

If any building, place, and utensil, shall be used without being so described or distinguished, or without such letter or number being so painted and continued thereon, or any pipe be found without being so shewn or described, or different from such drawing or description, every such building, place, or utensil, shall be deemed unentered, and the person using the same shall, for every offence, forfeit, above all other penalties, 200*l.* § 7.

Of Officers.

No person can take any office or employment under the excise, until he has taken the oaths of allegiance and supremacy, together with the following, *viz.*

‘ You shall swear to execute the office of truly
‘ and faithfully, without favour or affection, and shall from time to
‘ time true account make and deliver to such person or persons as
‘ his Majesty shall appoint to receive the same, and shall take no
‘ fee or reward for the execution of the said office from any other
‘ person than from his Majesty, or those whom his Majesty shall
‘ appoint in that behalf.”

And all persons admitted to offices, civil or military, in England, must receive the sacrament of the Lord's supper, according to the usage of the church of England, in some public church upon a Lord's-day, after service and sermon, within three months after admission; and a certificate thereof under the hands of the minister and churchwardens must be produced in court, and there confirmed by the oath of two witnesses; and they must take and subscribe the oaths of allegiance, supremacy, and abjuration, and make and subscribe the declaration against transubstantiation.

And all persons admitted to offices, civil or military, in Scotland, must take and subscribe the oaths of allegiance and abjuration, and subscribe the assurance, in the court of session, justiciary, or exchequer, or at the quarter sessions where the person resides, within three months after admission.

And all persons aforesaid who shall neglect to take the oaths, shall be judged incapable to enjoy such offices; and every person who shall neglect to take the oaths, and shall execute any of the said offices, being convicted, shall be disabled to sue in any court of law or equity, or to be guardian to any child, or executor or administrator to any person, or capable of any legacy or deed of gift, or to be in any office, or to vote in any election for members of parliament, and shall forfeit 500*l.* to him that shall sue for the same. Any person who by neglect shall forfeit his office, may be capable of a new grant of the same, or any other office, on taking the oaths, if such office be not granted to another.

By the annual Indemnity Act, persons who have omitted to qualify themselves for any office, place, or employment, and who on or before a certain day shall take and subscribe the oaths, declarations, and assurance in such cases, wherein by law the said oaths, declarations, and assurance, ought to have been taken and subscribed; and also shall, on or before the said day, receive the sacrament of the Lord's supper, according to the usage of the church of England, in such cases wherein the said sacrament ought to have been received, or shall, on or before the said day, make and subscribe the declaration against transubstantiation, and also the declaration in the 30 Car. II. st. 2. in such cases wherein the said declaration ought to have been made and subscribed, or take and subscribe the oath directed by 18 Geo. II. c. 20. in such cases wherein the said oath ought to have been taken and subscribed, shall be indemnified against all penalties, forfeitures, incapacities, and disabilities, incurred by reason of any neglect or omission previous to the passing of the act.

Persons in Ireland neglecting to qualify themselves agreeably to the Irish act, 2 Anne, and who shall qualify on or before a certain day, are in like manner indemnified.

But this act does not indemnify any person against whom final judgment shall have been given. Nor does it exempt any justice of the peace from the penalties for acting as such without being qualified by law.

And for the relief of persons whose appointments and admissions, or the entries of whose admission, may not have been provided, or not duly stamped, or where the same have been lost or mislaid, it shall be lawful for such persons in Great Britain, on or before a certain day, to provide appointments and admissions, or entries of admission, duly stamped; and such persons so providing appointments, admissions, or entries of admissions, as aforesaid, duly stamped, shall be confirmed and qualified to act as clerk of the peace, town clerk, or other public officer, or member or members, officer or officers of cities, corporations, and borough towns, and may enjoy such offices, or any other into which they have been elected, notwithstanding their omission, or the omission of any of their predecessors, and shall be indemnified from all incapacities, forfeitures, penalties, and damages.

The act does not extend to restore any person to any office or employment already avoided by judgment, or already legally filled up and enjoyed by any other.

Every person who at the passing of the act shall have neglected to cause any affidavit to be made and filed, of the actual execution of contracts to serve as clerk to attorneys or solicitors, scriveners, or public notaries, or such contract or indenture to be enrolled, and who, on or before the first day of Hilary Term, shall cause such contract or indenture to be enrolled, and affidavits filed, shall be indemnified against all penalties, forfeitures, incapacities, and disabilities,

In case any action, suit, indictment, or information, shall be

brought or prosecuted against any person indemnified, such person may plead the general issue.

No officer of excise is liable to any penalty for not delivering or leaving a copy of any charge made by him, unless such copy shall, by the party entitled, or by his order, be demanded of him in writing.

If any person to whom any money, or securities for money, shall be issued for public services, shall embezzle such money, or fraudulently apply the same to his own use, or for any purpose except for public services, such person shall be adjudged guilty of a misdemeanor, and be transported, or receive such other punishment as may by law be inflicted on persons guilty of misdemeanors, and as the court before whom such offender may be tried shall adjudge. 50 Geo. III. c. 59. § 1.

If any officer, collector, or receiver, entrusted with the receipt, custody, or management of any part of the public revenue, shall furnish false statements or returns of the money collected by him or entrusted to his care, or of the balances of money in his hands, such person, being thereof convicted, shall be adjudged guilty of a misdemeanor, and suffer fine and imprisonment at the discretion of the court, and be rendered for ever incapable of holding any office under the crown. § 2.

Securities.

All persons appointed to any office, employment, or commission, civil or military, or to any office or employment of public trust under the crown, are required to give security with sureties or otherwise, within one month after notice of such appointment if in England, or within two months if in Scotland or Ireland, or within six months if in any other part of Europe, or in America or the West Indies, or within nine months if in Africa, or within eighteen months if in the East Indies or any other part of Asia, or within ten months if on the high seas, unless they shall sooner arrive in England, Wales, Scotland, or Ireland, and then within two months after such arrival. 50 Geo. III. c. 85. § 1.

And by 52 Geo. III. c. 66. § 11. it shall be lawful to take bonds and securities to be granted by persons holding public offices in Scotland, according to the forms observed in Scotland, or according to the forms observed in England, and also to prosecute and recover upon the bonds, according to the forms in the law of Scotland, or according to the forms in the law of England, either in the court of session or court of exchequer in Scotland, and according to the process used in these respective courts, as shall appear best calculated to obtain the speedy recovery of the public money.

Sale of Offices.

By 5 & 6 Edward IV. c. 16. § 2, 3. if any person shall bargain or sell any office, or deputation of any office, or any part or parcel

thereof, or receive any money, fee, reward, or profit, or take any promise, agreement, covenant, bond, or assurance to receive any money, fee, reward, or profit, directly or indirectly, for any office, or deputation of any office, or any part thereof, or to the intent that any person shall have, exercise, or enjoy any office, or deputation of any office, or any part thereof, which office shall anywise concern the administration or execution of justice, or the receipt, controlment, or payment of the king's treasure, money, rent, revenue, or any of the king's customs, or any administration or attendance to be done or executed in any of the king's custom-houses, &c. such person shall not only forfeit his right and interest in such office or deputation, or part thereof, but also every person who shall give or pay any money, reward, or fee, or make any promise, agreement, bond, or assurance, for any of the said offices, or deputation, or part of them, shall be adjudged a disabled person to occupy or enjoy such office, deputation, or part thereof; and every such bargain shall be void.

By 49 Geo. III. c. 126. § 1. the act 5 & 6 Edw. VI. c. 16. shall extend to Scotland and Ireland, and to all offices in the gift of the crown, or appointed by the crown, and to all places under the appointment of the lord high treasurer, or commissioners of the treasury, the commissioners of excise, &c.: and the said act and this act shall be construed as one act. And moreover, the several offences enumerated in the act of 5 & 6 Edw. VI. are by this act declared to be misdemeanors.

If any person shall open or keep any house, office, or place for transacting business relating to the sale of offices or employments in any public department, such person, and every person who shall knowingly aid, abet, or assist therein, shall be deemed guilty of a misdemeanor. § 5.

If any person shall advertise or publish, or cause to be advertised or published, any house, office, or place, to be kept for the purpose aforesaid, or the name of any broker or agent for any of the purposes aforesaid, or print, or cause to be printed, any advertisement or proposal for the purposes aforesaid, he shall forfeit 50*l.* to be recovered in any of the courts of record at Westminster or Dublin, or in his Majesty's courts in Scotland; and the whole of such penalty shall go to the person who shall sue for the same, with costs of suit. § 6.

And every person who shall commit in Scotland any offence against this act, constituted a misdemeanor, shall be punished by fine and imprisonment, or by such punishment as the judge before whom he is tried may direct. § 13.

Seizures.

By 56 Geo. III. c. 104. § 1. every officer of customs shall have the like powers for the examination, seizure, detention, removal, and prosecution of any ship, boat, or vessel, cart, or carriage, horse, or cattle, or any goods whatsoever, forfeited under any law of excise, as are or shall hereafter be granted, or be exercised

by any officer of excise; and every officer of excise shall have the like powers for the examination, seizure, detention, removal, and prosecution of any ship, boat, or vessel, cart, or carriage, horse, or cattle, or goods whatsoever, forfeited under any law relating to the customs, as are or shall hereafter be granted, or be exercised by any officer of customs.

Obstructing Officers.

By 6 Geo. I. c. 21. § 7. if any person shall oppose, molest, hinder, or obstruct any officer of excise in the execution of the powers given him by this or any other act relating to the duties of excise, he shall forfeit 10*l*.

Fees, Bribes, and Collusive Seizures.

By 15 Car. II. c. 21. § 23. no commissioner or any other officer of excise shall, directly or indirectly, receive any fee or reward for the taking of bouds, or the giving of receipts or notes relating to the excise; on pain of forfeiting 10*s*.

By 1 W. & M. sess. 1. c. 14. § 16. no commissioner, or other person employed about the duty of excise, shall demand, take, or receive any money or other reward, but from the king; upon pain of forfeiting his office, and becoming incapable of executing any office in the excise, upon proof thereof by two credible witnesses before two justices.

By 11 Geo. I. c. 30. § 40. if any person liable to any of the duties of excise shall, in order to corrupt, persuade, or prevail upon any officer to do any thing contrary to his duty, or to omit any thing belonging to his duty, or to connive at or conceal any fraud relating to the said duties, give, or offer to give, or secure to him, any bribe, gratuity, or reward, he shall forfeit 500*l*.

By 9 Geo. II. c. 35. § 24, 25. if any person shall offer a bribe or reward to any officer of customs or excise, to connive at, or permit any customable or prohibited goods to be run on shore, or to connive at any false or short entry of any such goods, or to do any other act whereby the king may be defrauded in his revenues, he shall (whether the offer be accepted or not) forfeit 50*l*.

By 24 Geo. III. sess. 2. c. 47. § 32, 38. if any officer of the navy, customs, or excise, shall make any collusive seizure, or deliver up, or make an agreement to deliver up, or not to seize any ship or vessel, or any goods liable to forfeiture by this or any other act, or directly or indirectly take any bribe, gratuity, or reward, for the neglect or non-performance of his duty, he shall forfeit 500*l*. and be rendered incapable of serving the king in any office civil or military; and if any person shall give, offer, or promise to give, any bribe or reward to, or make any collusive agreement with any such officer, to do, conceal, or connive at any act, whereby any provisions made by this or any other act relative to the customs or excise may be evaded or broken, he shall (whether such offer, proposal, or agreement, be accepted or performed, or not) forfeit 500*l*.

Paper for Permits.

By 28 Geo. III. c. 70. § 11. if any officer of excise or inland duties shall deliver out, or suffer to be delivered out, any paper having the words *Excise Office* visible in the substance thereof, either before or after the stamp or mark provided by the commissioners of excise shall be printed thereon, or before the same shall be filled up, agreeably to the request-note brought from any trader for the purpose of having a permit for the removal of some excisable commodity; or if any such officer shall knowingly grant any false permit, or make a false entry in the counterpart of any permit by him granted for the removal of any excisable commodity into the stock of any dealer, brought in with a false or forged permit, or shall knowingly permit the same to be done; every such officer, being thereof convicted, shall be adjudged guilty of felony, and be transported for any time not exceeding seven years.

By 38 Geo. III. c. 54. § 8. if any officer of excise shall knowingly accept any counterfeited, forged, or untrue certificate, or under colour thereof knowingly give to any maker, manufacturer, or dealer, any undue credit in any book relating to the duties of excise, with intent that any such maker, &c. may obtain any undue drawback for any goods never in reality shipped and exported, every officer so offending, being thereof convicted, shall be adjudged guilty of felony, and be transported for seven years.

Officers trading.

By 12 Geo. I. c. 28. § 7. if any officer of customs, excise, or inland duties, shall deal or trade in tea, coffee, brandy, or other excisable liquors, he shall not only lose his office, but also forfeit 50*l.* and be rendered incapable of employment in any branch of the revenue for the future.

Constables to assist Officers.

By 11 Geo. I. c. 30. § 38, 39. if, upon due request made by any officer of excise to any constable, headborough, or other ministerial officer of the peace, he shall refuse or neglect to go along with him, and be present at the doing of any thing where his presence, by the laws now in being or hereafter to be made, shall be required, he shall forfeit 20*l.*

Of Permits and Certificates.

By 23 Geo. III. c. 70. § 8. the commissioners of excise in England and Scotland shall, on or before the 29th September 1783, provide moulds or frames for making of paper to be used for permits, which paper shall have the words *Excise Office* visible in the substance thereof; and shall also provide plates engraved with certain marks, stamps, and devices, in manner as to them shall seem meet, for printing, stamping, and marking the said paper: and all permits from thenceforth shall be printed, stamped, and marked by the said plates on paper so made; which paper shall be made, and plates engraved, by persons appointed by the commissioners.

By 52 Geo. III. c. 143. § 9. if any person (not being lawfully appointed or authorized) shall make, or cause to be made, or knowingly assist in making, or, without being authorized as aforesaid, shall knowingly have in his possession, without lawful excuse (the proof whereof shall lie on the person accused), any frame, mould, or instrument, for the making of paper with the words *Excise Office* visible in the substance of such paper; or shall make, or cause to be made, or knowingly assist in making any such paper; or (not being appointed as aforesaid) shall engrave, cast, cut, or make, or cause to be engraven, cast, cut, or made, any mark, stamp, or device, in imitation of that made or used by the direction of the commissioners of excise in England or Scotland for the printing, stamping, or marking paper, to be used for permits to accompany any exciseable commodity removing from one part of Great Britain to another; every person so offending, being thereof convicted, shall be adjudged guilty of felony, and suffer death without benefit of clergy.

By 11 Geo. I. c. 30. § 10. no person shall demand or receive any permit from the officer, for the removal of brandy, arrack, rum, spirits, and strong waters, coffee, tea, and cocoa-nuts, without the special direction in writing of the person, or his servant, out of whose stock the same are to be removed; on pain of forfeiting 50*l.* or in default of payment, to suffer imprisonment for three months.

If any person shall take out permits for removing such goods, and if within the time limited in such permits he shall not either send away the goods, or return such permits to the officer, he shall forfeit treble the value of the goods mentioned in such permits, and not removed, to be estimated according to the highest rate of the like goods at the time of the forfeiture; and if such permits are not so returned, and there shall not appear a sufficient decrease to answer the removal, the person out of whose stock the goods shall be authorized to be removed shall forfeit the like quantity, to be seized by the officer out of the like goods then in his possession. § 10.

By 21 Geo. III. c. 55. § 27. the officers who give permits are bound to express and limit, in every such permit, as well the time for which such permits shall be in force for removing such goods from the stocks of the persons taking out such permits, as also the time within which the same shall be delivered into the stocks of the persons to whom the same shall be permitted to be sent.

If any goods liable to excise or inland duties, and which are required to be removed with permit, are not actually removed from the stocks of the persons taking out such permits, within the time limited in the respective permits, or, in default of removing the goods, the respective permits shall not be returned to the officer from whom the same were had; the person from whose stock the said goods are hereby authorized to be removed, shall be subject to the penalties and forfeitures in 11 Geo. I. c. 30; and in case the goods mentioned in such permits shall be removed from the stocks of the persons taking out the same within the time limited therein, and shall not within the time limited be actually

delivered into the stock of the persons to whom the same are mentioned to be sent, all such goods so removed shall be deemed goods removed or removing without permit. § 27.

In case the said goods, shall, by unavoidable accident, be prevented from being delivered within the time limited in such permit, the court, where any information shall be brought for the condemnation of any such seizure, shall, upon proof of such accident, direct the goods to be restored to the owner. § 28.

By 23 Geo. III. c. 70. § 10. if any person shall counterfeit or forge, or cause to be counterfeited or forged, any permit for the removal of any excisable commodity; or shall knowingly give any false permit, or receive any false permit with any such commodity; or shall fraudulently alter or erase any permit after the same shall have been granted by the proper officer of excise; or shall knowingly publish or make use of any permit so counterfeited, forged, false, altered, or erased; every person so offending shall (in lieu of any former penalty) for every offence forfeit 500*l*.

By 57 Geo. III. c. 128. § 13. every person who shall sell, lend, or make use of, or cause or suffer any permit granted under any law of excise to be sold, lent, or made use of, for any other purpose than to accompany the removal of the goods for which the same was granted, and which shall be therein described, or shall produce, or cause the same to be produced, to any officer or person as having been received with any goods other than as aforesaid, or shall use, or cause, or suffer to be used, any permit, so as that any account kept by the officers of excise by such permit may be frustrated or evaded, shall forfeit 500*l*. over all other penalties and forfeitures; and every permit used for any purpose other than to accompany the removal of the goods for which it was granted, shall be deemed a false permit; and such use shall, over all other penalties and forfeitures, subject the person using the same to the penalties and forfeitures for using any false permit.

By 41 Geo. III. c. 91. § 5. if any person shall counterfeit or forge, or cause to be counterfeited or forged, any certificate authorized or required to be granted by any officer of excise, or shall knowingly give any false certificate, or receive any false certificate, or alter or erase any certificate after the same shall have been granted by any officer of excise; or shall knowingly publish or make use of any certificate so counterfeited, forged, false, altered, or erased, every person so offending being thereof convicted shall be adjudged guilty of felony, and be transported for seven years.

By 38 Geo. III. c. 54. § 9. if any person shall counterfeit or forge, or cause to be counterfeited or forged, any debenture, in any case in which a debenture is; by any act relating to the duties of excise, required to be granted, or knowingly make use of any counterfeited or forged debenture, every person so offending being thereof convicted, shall be deemed guilty of felony, and suffer death without benefit of clergy.

By 52 Geo. III. c. 143. § 10. if any person shall forge, counterfeit, or alter, or cause to be forged, counterfeited, altered, or

assist in forging, counterfeiting, or altering, any debenture or certificate for the payment or return of money, or any part of such debenture or certificate, or any signature thereon, in any case in which such debenture or certificate is by any act relating to the duties of customs or excise required, or shall wilfully alter or make use of any such debenture or certificate so forged, counterfeited, or altered, every person so offending, being thereof convicted, shall be adjudged guilty of felony, and suffer death without benefit of clergy.

By 28 Geo. III. c. 70. § 11. if any officer of excise shall deliver out any paper having the words *Excise Office* visible in the substance thereof, before the same shall be filled up agreeably to the request-note of a trader, for the removal of some exciseable commodity; or shall knowingly grant any false permit, or make a false entry in the counterpart of any permit, or shall knowingly take any exciseable commodity into the stock of any dealer with a false or forged permit; every such officer, being thereof convicted, shall be adjudged guilty of felony, and transported for any time not exceeding seven years.

By 38 Geo. III. c. 54. § 8. if any officer of excise shall knowingly accept any forged or untrue certificate, or, under colour of such certificate, knowingly give to any maker or dealer undue credit in any book relating to the duties of excise, with intent that such maker may obtain drawback for goods never in reality shipped and exported, every officer so offending, being thereof convicted, shall be adjudged guilty of felony, and transported for seven years.

Of Prosecutions.

By 12 Car. II. c. 23. § 31. and c. 24. § 45. all forfeitures and offences made and committed against this act, if within the limits of the chief office of excise in London, shall be heard, adjudged, and determined by the major part of the commissioners of excise, or by the major part of the commissioners for appeals, in case of appeal; in all other counties, cities, towns, or places, by two or more justices of peace residing near to the place where such forfeitures shall be made, or offence committed; and in case of neglect or refusal of such justices by the space of fourteen days after complaint made, and notice thereof given to the offender, then the major part of the sub-commissioners appointed for any such city, county, town, or place, shall hear and determine the same; and if the party find himself aggrieved by the judgment given by the said sub-commissioners, he may appeal to the justices of peace at the next quarter-sessions, who are to hear and determine the same, whose judgment therein shall be final.

By 15 Car. II. c. 11. § 24. the justices of peace, or any two of them, as chief magistrates, in the several counties, cities, divisions, and places within Great Britain, shall meet once in every month in their respective divisions, or oftener if there shall be occasion; to hear, determine, and adjudge all matters and offences against this or the acts of 12 Car. II.

By 6 Geo. I. c. 21. § 20. where any brandy, arrack, rum, spirits, or strong waters, British or foreign, shall be seized as forfeited by virtue of this or any other act relating to the customs or excise, by any officer of the said revenues, all such seizures (except where made for unlawful importations, and the whole quantity at one time for that cause seized does not exceed sixty-three gallons) shall in a summary way be proceeded upon, and determined in the manner after-mentioned, *viz.* if made within the limits of the chief office of excise in London, before the major part of the commissioners of excise; and if made without the said limits, before two justices of peace residing near the place where the seizure shall be made.

Every other forfeiture which shall be made in pursuance of any act relating to the duties of excise or other duties under the management of the commissioners of excise, shall be proceeded upon and determined in the same manner as herein directed upon seizures of brandy, arrack, rum, spirits, or strong waters, and not exceeding as aforesaid. § 22.

By 8 Geo. I. c. 18.* § 16. all seizures of vessels or boats, of the burthen of fifteen tons or under, seized by virtue of 8 Ann. c. 7. and 8 Ann. c. 13. or of any other act relating to the customs, for carrying uncustomed or prohibited goods from ships inwards, or for relanding certificate or debenture goods from ships outwards, and of horses, cattle, or carriages used in the removing of such goods contrary to the said acts, shall be proceeded upon and determined by two justices of peace residing near the place where the seizure shall be made, in such manner as is directed by 6 Geo. I. c. 21. with respect to seizure of brandy, &c.

Any two justices of peace of London and Westminster shall have the like power and authority, in hearing and determining such seizures as shall be made within those cities, as the justices of peace of any other county or place. § 17.

By 1 Geo. II. c. 16. § 4, 5, all complaints and informations at the chief office in London for the duties of excise, and other duties there managed, exhibited by traders and dealers in commodities liable to such duties apprehending themselves overcharged, and by prosecutors and informers against them for any offences against the laws relating to such duties, shall be heard, adjudged, and determined by any three or more of the commissioners for the said duties.

By 12 Car. II. c. 23. § 31. and c. 24. § 45. the commissioners for appeals, chief commissioners for excise, justices of peace, and sub-commissioners respectively, upon any complaint or information exhibited and brought, of any forfeiture made, or offence committed, shall summon the party accused, and upon his appearance, or contempt, proceed to the examination of the matter of fact; and upon due proof made thereof, either by the voluntary confession of the party, or by the oath of one or more credible wit-

* This act, which was to be in force for a limited time, was continued by several subsequent acts, and made perpetual by 49 Geo. III. c. 20.

nesses, shall give judgment, and issue out warrants under their hands, for levying the penalties or forfeitures upon the goods and chattels of the offender, and cause sale to be made thereof, if not redeemed within fourteen days, rendering to the party the overplus, if any be; and, for want of sufficient distress, shall imprison the offender till satisfaction be made.

By 12 Car. II. c. 23. § 32. and c. 24. § 46. the justices of the peace, commissioners for excise, or any two of them, or their sub-commissioners, may mitigate, compound, or lessen the penalties or forfeitures, as in their discretion they shall think fit, so that the mitigation be not made less than double the value of the duty which should have been paid, besides reasonable costs and charges of such officers or others as were employed therein, to be to them allowed by the said justices.

By 33 Geo. III. c. 55. § 2. no person acting under any warrant of distress shall be deemed a trespasser on account of any irregularity in the proceedings; but any person aggrieved by the execution of such warrant may recover the damage sustained, in an action on the case.

Where any penalty may by the warrant of any justice be directed to be levied by distress, if sufficient distress cannot be found within the limits of his jurisdiction, on oath being made thereof before a justice of any other place (which oath shall be certified on such warrant), such penalty shall be levied by distress and sale of the defaulter's goods in such other place; and if no distress can be found, the offender shall be proceeded against according to law. § 3.

By 47 Geo. III. sess. 2. c. 66. § 43. in all cases where any person shall be convicted of any offence against the revenue laws, before the court of quarter-sessions, or any justice or justices of the peace out of sessions, and such court, justice, or justices, shall mitigate the penalty, they may take a recognizance from the offender in double the amount of the sum in which he may have been convicted, that if he shall, within three years from the date of such conviction, be again convicted of any offence against any law now in force, or hereafter to be made, relative to the customs or excise; he shall pay the sum in which he may have been convicted, after deducting the sum paid according to such mitigation; and where such recognizance shall become forfeited, it shall be lawful for the said court or justices to apprehend the offender; and if he shall not forthwith pay the sum according to the recognizance, to levy the same upon his goods and chattels, or to commit him to gaol for twelve months, or until such sum be paid.

By 6 Geo. I. c. 21. § 21, 22. in all cases where any goods shall be seized as forfeited (except where spirits shall be seized for unlawful importation, and the whole quantity at one time for that cause seized doth exceed sixty-three gallons), and no person within twenty days after the seizure shall appear to claim the same; then, if the seizure shall be made within the limits of the chief office of excise in London, it shall be lawful for the officer

who made seizure, after the expiration of twenty days, to cause notice, signed by the solicitor of excise, to be fixed at the Royal Exchange, signifying the day and time that the commissioners will proceed to hear the matter of such seizure: and if the seizure shall be made out of those limits, it shall be lawful for the officer, after the expiration of twenty days, to cause proclamation to be made at the next market-town to the place of seizure, on the next market-day after the expiration of the said twenty days, of the day and place when and where the justices of the peace will proceed to hear the matter of such seizure, and to the condemnation thereof; in which cases it shall be lawful for the commissioners and justices to proceed to examine into the cause of seizure, and to give judgment for the condemnation of such goods as shall appear to be forfeited, and of the casks and vessels containing the same.

By 57 Geo. III. c. 87. § 7. in all cases where any goods, boats, carriages, horses, or cattle, shall be seized as forfeited under any law of customs or excise, and no person shall appear to the officer who made the seizure to claim the same; if such seizure shall be made out of the limits of the chief office of excise in London, it shall be lawful for the officer who shall make such seizure, to cause public notice to be given by proclamation at the next market-town to the place of seizure, upon the market-day next after the expiration of six days from the time of seizure, of the day and place when and where the justices of the peace will proceed to hear the matter of seizure, and of condemnation of the goods seized; in which case it shall be lawful for the justice to examine into the cause of seizure, and to give judgment for the condemnation of such goods, and of the casks or packages containing the same, and of the boats, carts, or carriages, horses, or cattle seized, as shall appear to be forfeited; which judgments shall be as good and effectual as if the owner thereof, or person in whose custody the same were at the time of the seizure, had been summoned to attend the said justices.

By 32 Geo. III. c. 10. § 1, 2. in case any person against whom any body-warrant shall be issued by any three of the commissioners of excise in England, or by any justice of the peace in Great Britain, by virtue of any act now in force, or hereafter to be made, relating to the duties of excise, shall escape, go into, reside, or be in any other county, division, city, or liberty, out of the jurisdiction of the commissioners or justice granting such warrant, it shall be lawful for any three of the said commissioners, or any justice of the peace of the place where such person shall be, upon proof upon oath of the hand-writing of the commissioners or justice granting such warrant, to indorse their names on such warrant, which shall be a sufficient authority to the person bringing it, or any other to whom directed, to execute it there, and bring the offender before the commissioners or justice indorsing it, or some other justice of the same jurisdiction, who, by indorsement upon such warrant, may commit such offender to the common gaol or

house of correction where it shall be executed, there to remain until delivered by due course of law.

By 27 Geo. II. c. 20. § 1. in all cases where justices of peace are or shall be required or empowered, by any act now in force, or hereafter to be made, to issue a warrant of distress for the levying of any penalty, or any sum directed to be paid in consequence of such acts, it shall be lawful for them to order the goods and chattels so to be distrained to be sold within a certain time to be limited in such warrant, so as such time be not less than four days, nor more than eight days, unless such penalty or sum, together with the reasonable charges of taking and keeping the distress, be sooner paid.

The officer executing such warrant, if required, shall shew the same to the person whose goods and chattels are distrained, and suffer a copy thereof to be taken. § 3.

By 1 W. & M. sess. 1. c. 24. § 16; 12 & 13 W. III. c. 11. § 17. no information shall be brought, laid, or prosecuted, against any common brewer, alehouse-keeper, distiller, vinegar-maker, or cyder-maker, for any false or mis-entry, or other offence, unless the same be laid and entered before such persons appointed to determine the same within three months next after such offence; and that notice thereof be given to such person (against whom such information shall be laid) in writing, or left at his dwelling-house, within one week after the laying and entering such information.

By 1 W. & M. sess. 1. c. 24. § 13. the commissioners of excise or appeals, or justices of peace, within whose jurisdiction respectively any brewer, maker, or retailer of exciseable liquors shall inhabit, upon complaint of any overcharge returned upon him by the gaugers, shall hear and determine such complaint, and examine the witnesses on each side upon oath, and thereupon or by other due proof acquit such brewer, &c. of so much as shall be made out to be an overcharge.

By 32 Geo. II. c. 17. § 1. where the commissioners of excise and justices of peace have respectively issued out any summons for the appearance of persons offending against, or for forfeitures incurred by the laws of excise, or other laws for collecting and securing the duties under the management of the commissioners of excise, which hath been left at the house or usual place of residence, or with the wife, child, or menial servant of such persons, every such summons so left shall be a good and sufficient summons, and as legal and effectual a notice as if the same had been delivered into the proper hands of such persons to whom the same was by name directed. If the summons be made out in the assumed name of the party, it will be equally valid. § 2.

By 7 & 8 W. III. c. 30. § 24. it shall be lawful for the commissioners of excise, and justices of peace respectively, upon any information exhibited before them for any offence committed against the laws of excise, to summon any person (other than the party accused) to appear before them at a certain day, time, and place, to be inserted in such summons, and to give evidence for the dis-

covery of the truth of the matter in controversy; and in case of neglect or refusal to appear, or if upon appearance such person shall refuse to give evidence when required, he shall forfeit 10*l*.

By the 5 Geo. IV. c. 94. to allow the averment of the order for prosecution by the commissioners of customs or excise to be sufficient proof of the order having been made, it is enacted, That the statement, allegation, or averment of the fact in the information or complaint, or in any prosecution or proceeding for the recovery of any fine, penalty, or forfeiture incurred under or by virtue of any act now in force, or which shall hereafter be made, relating to either of the revenues of customs or excise, or for the condemnation of any ship, boat, or other vessel, or any horse, cart, or other carriage, or any other goods, chattels, wares, or merchandize whatsoever, seized as forfeited, or forfeited under or by virtue of any such act, shall be deemed and taken to be sufficient evidence that such prosecution, information, complaint, or other proceeding was commenced, prosecuted, entered, or filed by order of the said commissioners of customs or excise respectively, without any other or further evidence of the fact, unless by other positive evidence the contrary shall be made to appear.

Justices of the peace engaged or interested in any trade coming under the laws of excise, are prohibited from acting in any manner relating to, or offence committed against the laws relating to their particular trade; and any act so committed is void.

Any justice of peace acting for any county at large may act as such at any place within any city, town, or other precinct, being a county of itself, and situate within or adjoining to such county at large; but this act shall not give power to the justices of peace for any county at large, not being justices for such city, &c. or any constable or other officer acting under them, to act in any matters arising within any such city, &c. in any manner whatsoever.

Appeals.

By 15 Car. II. c. 11. § 19. no appeal in any cause of excise shall be admitted, until the appellant shall have first deposited the single duty in the hands of the commissioners, farmers, or sub-commissioners, within whose jurisdiction the cause was originally heard and determined, and given security to the commissioners of appeal or justices of peace respectively, where the cause is to be finally adjudged, for such fine, penalty, or forfeiture, as was adjudged against him: and if the original judgment shall be reversed, the said single duty, or as much thereof as shall be directed by the commissioners of appeals, or justices, shall be restored to the appellant, and the prosecutor shall pay him double costs; but in case the first judgment shall be affirmed, the appellant shall pay the like costs unto the commissioners complained of.

No appeal in any cause of excise, within the limits of the chief office in London, shall be admitted, unless brought within two months after the first judgment, and notice thereof given or left at the dwelling-house of the party concerned therein; nor shall any appeal in any cause of excise, in any other county, city, town, or

place, be admitted, unless brought within four months after the first judgment, and notice given as aforesaid. § 26.

Of Fines, Penalties, and Forfeitures.

By 49 Geo. III. c. 81. § 9. all fines, penalties, and forfeitures, imposed by this or any other acts of parliament now in force, or hereafter to be made, relating to the duties of excise, shall and may be sued for, levied, recovered, and mitigated, by such ways, means, and methods, as any fine, penalty, or forfeiture, is or may be by any law or laws of excise, (not otherwise specially directed by this or any other such act), or by action of debt, bill, plaint, or information, in any of the courts of record at Westminster, or in the court of exchequer in Scotland; and one moiety of every such fine, penalty, or forfeiture, shall be to the king, and the other to him who shall discover, inform, or sue for the same.

By 33 Hen. VIII. c. 39. § 25. if any suit be commenced or taken, or any process awarded to the king for the recovery of any of the king's debts, the same suit and process shall be preferred before the suit of any person, and the king shall have first execution against any defendant of and for his debts before any other person; so always that the king's suit be taken and commenced, or process awarded for the debt at the suit of the king, before judgment given for the other person.

By 59 Geo. III. c. 104. § 13. in any prosecution carried on in the court of exchequer at Westminster, or court of exchequer at Edinburgh, by order of the commissioners of customs or excise in England or Scotland, it shall be lawful for the said commissioners respectively, under the direction of the lords of the treasury, to order the whole or any part of the costs and expences of such prosecution (whether the money recovered by penalty or composition shall be sufficient to answer such costs and expences, or not) to be paid out of his majesty's share of penalties arising by customs or excise prosecutions, and to allow the officer concerned in such prosecutions, or person through whose information or by whose means such offences were defeated, any sum of money not exceeding a moiety of the sum so recovered.

By 12 Geo. I. c. 28. § 28; 26 Geo. III. c. 77. § 13. it shall not be lawful for any person to commence or prosecute, or cause to be commenced or prosecuted, any action or information in any of his majesty's courts, against any person, for the recovery of any fine, penalty, or forfeiture incurred by virtue of any act now in force, or hereafter to be made, relating to the customs or excise, but in the name of his majesty's attorney-general, or of some officer of the said revenues; and if any action or information shall be commenced or prosecuted in any other person's name, the same, and all proceedings thereupon had, are hereby declared null and void; and the court in which it shall be commenced or prosecuted shall not permit any proceedings to be had thereupon.

By 46 Geo. III. c. 112. § 1. the regulations in 26 Geo. III. c. 77. § 13. shall be in force, and put in execution in relation to all pro-

ceedings in respect to any fine or forfeiture incurred under any act relating to the excise, before the commissioners of excise in England, or before the justices of peace in England and Scotland.

By 56 Geo. III. c. 104. § 15. it shall not be lawful for any person to commence or prosecute, or cause to be commenced or prosecuted, any action or information for the recovery of any fine, penalty, or forfeiture incurred by virtue of any act now in force, or hereafter to be made, relating to the customs or excise, or to issue or cause to be issued, any writ of appraisement for the condemnation of any ship, boat, or vessel, or any goods seized as forfeited by virtue of any such acts, unless the same be commenced, prosecuted, or issued, by order of the commissioners of customs or excise, or by or in the name of his majesty's attorney-general; and if any action, information, or writ of appraisement, is commenced, prosecuted, or issued, except upon such order, or by or in the name of his majesty's attorney-general, the same, and all proceedings thereupon, shall be void, and the court or justice of peace where or before whom such action, &c. shall be commenced, prosecuted, or issued, shall not permit any proceedings to be had thereupon.

By 26 Geo. III. c. 77. § 14. if any prosecution shall be commenced or depending by any officer of customs or excise, for the recovery of any fine, penalty, or forfeiture incurred by virtue of any act now in force, or hereafter to be made, relating to the said revenues, it shall be lawful for his majesty's attorney-general, in case it shall appear to his satisfaction that such fine, penalty, or forfeiture was incurred without any intention of fraud, to stop all further proceedings, by entering a *noli prosequi*, or otherwise, on every such information, as well with respect to the share of such fine, &c. to which the officer shall be entitled, as to the share belonging to the king.

The 54 Geo. III. c. 171. § 1. enacts, that whereas it is expedient that the commissioners of his majesty's treasury should be empowered to restore, remit, or mitigate any forfeiture, fine, or penalty incurred under any law relating to the revenue of customs or excise, or navigation and trade, either before or after the same shall have been adjudged in any court of law, or before any commissioners of excise or justice of the peace; it shall therefore be lawful for the commissioners of his majesty's treasury, or any three of them, by order under their hands, to direct any ships or goods seized as forfeited by virtue of any act relating to the revenue of customs or excise, or for the regulation of trade and navigation, to be restored to the proprietor on the conditions mentioned in such order; and also to mitigate or remit any penalty or forfeiture which shall have been incurred, or any part of any such fine or penalty, under these laws.

In any case where the commissioners of the treasury shall exercise the powers hereby vested in them, such goods shall be restored, or fines, penalties, or forfeitures, or any parts thereof, remitted or mitigated, upon such conditions, as to costs or otherwise,

as shall appear to them reasonable ; and no person shall be entitled to the benefit of any such order, unless the conditions therein are complied with. § 3.

By 47 Geo. III. sess. 2. c. 30. § 19. in case any goods or commodities, or any ships, vessels, boats, horses, cattle, or carriages, shall be seized as forfeited by virtue of any act relating to the excise, it shall be lawful for the commissioners of excise in England and Scotland respectively, on evidence given to their satisfaction that the forfeiture arose without any intention of fraud, to order the same to be restored to the proprietor or claimant, on such terms and conditions as they shall think fit ; but if such proprietor or claimant shall not comply with the terms or conditions prescribed by the commissioners, such goods, &c. shall be proceeded against for condemnation : and if he shall accept them, he shall not be entitled to any recompence or damage on account of the seizure.

By 53 Geo. III. c. 21. for the necessary subsistence of any poor person confined under exchequer process for recovery of duties or penalties by virtue of any act now in force, or hereafter to be made, relating to the customs or excise, or confined under a body warrant issued by the commissioners of excise in England, or by justices of peace within Great Britain, by virtue of any act now in force, or hereafter to be made, relating to the customs or excise, or confined under any writ of extent for debts due to his majesty, sued for by order of the commissioners of customs or excise, or on suit upon bonds taken pursuant to orders in council, it shall be lawful for any four of the commissioners of customs or excise in England, or any three of them in Scotland, to cause an allowance, not exceeding seven-pence halfpenny, and not less than four-pence halfpenny per day, to be made to any such poor person, out of any money in their hands arising from the duties of customs or excise.

By 9 Geo. II. c. 35. § 34. on all trials of seizures in the court of exchequer, or elsewhere, the seizure, together with the method and form of making it, shall be taken to have been made by the person who shall inform and sue for the same, and in the manner set forth in the information, without any evidence thereof ; and all judges and justices of peace before whom the same shall be brought to trial, shall proceed to the trial of the merits of the cause, without inquiring into the fact, form, or manner of making the seizure.

By 12 Geo. I. c. 8. § 28. if any foreign goods shall be seized for nonpayment of duties, or any other cause of forfeiture, and any dispute shall arise, whether the customs, excise, or inland duties have been paid for the same, or the same have been lawfully imported, legally compounded for, or condemned, or concerning the place from whence they were brought, the proof thereof shall lie on the owner or claimer, and not on the officer who shall seize or stop the goods.

By 23 Geo. III. c. 70. § 35. if any goods liable to duties of excise or inland duties shall be seized by virtue of any act now in force, or hereafter to be made, or if any action shall be brought by

the owner or claimer thereof, against any officer of excise or inland duties, or any person acting in his assistance, for any thing done in pursuance of such acts, the proof of the payment of the duties shall lie upon the owner or claimer, and not on the person who seized the goods, or against whom the action shall be brought.

By 24 Geo. III. sess. 2. c. 47. § 36. no claim shall be entered to any ship, vessel, or goods, seized for any cause of forfeiture, and returned into the courts of exchequer in England or Scotland respectively, but in the real names of the owners, describing their residence and business or profession: and if they reside at London or Edinburgh, oath shall be made, before one of the barons of the exchequer respectively, that the ship, vessel, or goods so claimed, were really their property at the time of seizure; but if such person shall not reside in London or Edinburgh, oath shall be made in like manner, by the attorney or solicitor by whom such claim shall be entered, that he has authority from the owners to enter such claim, and that to the best of his knowledge and belief, such ship, vessel, or goods, were at the time of seizure the property of the person in whose name such claim is entered; which oath shall be certified on the back of the indenture of appraisement upon which such claim shall be entered; and on failure thereof, the ship, vessel, or goods, shall be condemned, and judgment entered thereon by default, as if no claim had been entered thereto; and every person convicted of making a false oath to any of the facts before directed to be sworn, shall be liable to the penalties of perjury.

By 24 Geo. III. sess. 2. c. 47. § 37. upon entry of any claim to any ship, boat, vessel, or goods, the claimant (in case he shall reside in Great Britain) shall be bound with two sufficient securities, in the penalty of 100*l.* to pay the costs occasioned by such claim; and if not residing in Great Britain, then the attorney or solicitor, by whose direction such claim shall be entered, shall in like manner be bound.

By 19 Geo. III. c. 69. § 6. no writ of delivery shall be granted out of the court of exchequer for any ship, vessel, or boat, seized as forfeited by this act, and which by any former act relating to the customs or excise is directed to be burnt or destroyed, or used in his majesty's service, and which is hereby liable to be broken up, unless the officer seizing the same shall delay proceeding to the trial and condemnation thereof for the space of three terms, and in that case not without good security, in double the value of such ship, vessel, or boat, to return the same, if condemned, in order to be broken up, or used in his majesty's service.

By 26 Geo. III. c. 77. § 18. when any person shall be charged with assailing or obstructing any officer of customs or excise in the due execution of his office, or any person acting in his assistance, or with rescuing or attempting to rescue any uncustomed or prohibited goods after seizure thereof by any such officer, and the same shall be made appear to any judge of the court of King's Bench, by affidavit, or by certificate of an indictment or infor-

mation being filed against him for such offence, such judge may issue his warrant to cause the offender to be brought before him, or some other judge of the said court, or before a justice of peace, to be bound with two sufficient sureties in such sum as the warrant shall express, with condition to appear in the court to answer the indictment or information; and in case such person shall refuse to become bound, or be discharged by order of the court.

By 35 Geo. III. c. 96. where any person shall be detained in gaol for want of bail, the prosecutor of the indictment or information may cause a copy thereof to be delivered to him, or to the gaoler or turnkey, with a notice thereon indorsed, that unless he shall, within such time as shall be limited by the Court of King's Bench, cause an appearance, and also a plea of demurrer to be entered, an appearance, and the plea of not guilty, will be entered in his name; and in case he neglect, the prosecutor, on an affidavit thereof, may cause such appearance and plea to be entered for him, and such proceedings shall be had as if the defendant had appeared and pleaded not guilty; and if upon trial the defendant shall be acquitted, the judge before whom the trial shall be made, may order him to be discharged.

By 9 Geo. II. c. 35. § 32. where any writ, of *capias* or process shall issue out of any court against any person guilty of or prosecuted for any offence against the laws of customs or excise, directed to the sheriff, mayor, bailiff, or other person having the execution of process in any county, city, or liberty, such sheriff, mayor, or bailiff, and his under-sheriffs and deputies, upon the request or application of one of the known solicitors for the customs or excise, upon the back of the process, signed by him, with the addition of *solicitor for the customs or excise*, shall grant special warrants to such persons as shall be named by him, for apprehending the offender; or in default, shall be subject to such process of contempt, fines, amercements, penalties, and forfeitures, as they are now liable to in case of refusing or neglecting to execute the like process, where the defendant might have been taken thereupon in the usual method of proceeding.

Such sheriff, mayor, bailiff, under-sheriff, or other person granting such special warrants, shall be indemnified for all escapes, which may happen from the time of taking the offender, until he be committed to prison, or tendered to the gaoler. § 34.

By 48 Geo. III. c. 84. § 8. in all cases in which the Court of King's Bench, or justices of oyer and terminer, or gaol delivery, are empowered to take cognizance of any assault or obstruction of any officer of customs or excise, army, navy, or marines, or of any felony or offence against, or of any forfeiture incurred under any act now in force, or hereafter to be made, relating to the customs or excise, it shall be lawful for such court and justices to take cognizance of such offences or forfeitures committed and arising upon the high seas, as if the same had been committed or incurred on land within their jurisdiction.

By 12 Geo. I. c. 28. § 27. persons in prison for want of bail

(taken by *capias* issued out of the court of exchequer, or any other his majesty's courts of record at Westminster or Edinburgh) upon any information against them in the said courts, for having been concerned in unshipping goods liable to any custom or excise duties, or goods prohibited to be imported, or for knowingly receiving such goods, or for nonpayment of any custom or excise duties, or for any fraud concerning drawback or certificate goods, or any other fraud whatsoever, in order to diminish the said revenues, or upon any penal statute relating to the said revenues, and refusing or neglecting to appear to plead to such information, to be delivered to them or to the gaoler or turnkey of the prison, by the space of one term, judgment shall be entered against them by default; and if judgment shall be obtained against any such persons by default, verdict, or otherwise, and they shall not pay the sums recovered against them for any of the said offences, execution shall be awarded and issued, not only against their bodies, but also against their real and personal estates, though they continue in prison, for the sums so to be recovered against them.

By 9 Geo. II. c. 35. § 30, 25. if any person who keeps a tavern, alehouse, victualling-house, or house where ale, wine, brandy, or other strong liquors are sold by retail, shall knowingly receive, harbour, or entertain any person against whom a *capias*, or other process of arrest, shall have issued, for having beat, abused, or obstructed any officer of customs or excise in the execution of his office, or for having offended against any of the laws made for the preventing of frauds in those revenues, and to which *capias* the sheriff or other officer having execution of such process shall have returned that such person cannot be found, and the said person shall not have appeared to such process; or shall knowingly harbour, receive, or entertain any person, who, having been in prison for any of those offences, shall have escaped, or who shall have been convicted, and shall fly from justice, shall forfeit 100*l*. and be rendered incapable of having a licence for selling ale, wine, brandy, or other strong liquors by retail for the future; one moiety of which penalty shall be to the king, and the other to him who shall inform or sue for the same in any of the courts of record in Westminster, or in the court of exchequer at Edinburgh.

No person shall suffer this penalty or disability, unless notice shall have been first given six days before, in two successive Gazettes, of such person absconding, and also by writing fixed to the door of the parish church where he last dwelt. § 31.

By 52 Geo. III. c. 143. § 1. in all cases where any act done and committed in breach of or in resistance to any of the laws for collecting his majesty's revenue, would by the laws then in force, subject the offender to suffer death as guilty of felony without benefit of clergy, such act shall be deemed and taken to be felony with benefit of clergy, and punishable only as such, unless the same shall also be declared to be felony without benefit of clergy by this act.

By 23 Geo. III. c. 70. § 29; 26 Geo. III. c. 40. § 31; and

28 Geo. III. c. 37. § 24. in case any information or *suit* shall be commenced and brought to trial on account of the seizure of any goods seized as forfeited by virtue of this or any other act now in force (28 Geo. III.) or hereafter to be made, relating to the revenues of customs or excise, or of any ship, vessel, or boat, or of any horse, cattle, or carriage, used or employed in removing or carrying the same, wherein a verdict shall be found for the claimer, and it shall appear to the judge or court before whom the same shall be tried, that there was a probable cause of seizure, the judge or court shall certify that there was a probable cause for making such seizure; and in such case the claimant shall not be entitled to any costs of suit, nor shall the person who made such seizure be liable to any action, indictment, or prosecution, on account thereof; and in case any action, &c. shall be commenced and brought to trial against any person on account of such seizure (whether any information shall be brought to trial to condemn the same, or not) and a verdict shall be given against the defendant; if the court or judge before whom the same shall be tried shall certify that there was a probable cause for such seizure, then the plaintiffs, besides the things so seized, or the value thereof, shall not be entitled to above two-pence damages, nor to any costs of suit, nor shall the defendant be imprisoned, or be fined above one shilling.

By 28 Geo. III. c. 37. § 23. if any action shall be commenced against any person for any thing by him done in pursuance of this or any other act now in force, or hereafter to be made, relating to the revenues of customs or excise, it shall be commenced within three months next after the thing done, and be laid in the proper county; and the defendant may plead the general issue, and give this act and the special matter in evidence at any trial to be had thereupon; and if a verdict shall pass for the defendant, or the plaintiff shall become nonsuited, or discontinue his action, or judgment be given against him upon demurrer or otherwise, such defendant shall have treble costs awarded to him against such plaintiff.

By 23 Geo. III. c. 70. § 30; 24 Geo. III. sess. 2. c. 47. § 35: 28 Geo. III. c. 37. § 25. no writ or process shall be sued out against any officer of customs or excise, or against any person acting by his order in his aid, for any thing done in the execution or by reason of this or any other act now in force, (28 Geo. III.) or hereafter to be made, relating to the said revenues, until one calendar month next after notice in writing shall have been delivered to him, or left at the usual place of his abode, by the attorney or agent for the person who intends to sue out such writ or process; in which notice shall be clearly and explicitly contained the cause of action, the name and place of abode of the person in whose name such action is intended to be brought, and the name and place of abode of the said attorney or agent; and a fee of 20s. and no more shall be paid for the preparing and serving such notice.

By 23 Geo. III. c. 70. § 31. 24 Geo. III. sess. 2. c. 47. § 35; 28 Geo. III. c. 37. § 26. it shall be lawful for any officer, or person acting in his aid, to whom such notice shall be given, within one calendar month after, to tender amends to the person complaining, or to his agent or attorney; and if the same are not accepted, to plead such tender in bar to any action grounded on such writ or process, together with the plea of not guilty, and any other plea, with leave of the court in which such action shall be brought; and if, upon issue joined, the jury shall find the amends tendered to have been sufficient, they shall give a verdict for the defendant; and in such case, or if the plaintiff shall become nonsuited, or discontinue his action, or if judgment shall be given for such defendant upon demurrer, then such defendant shall be entitled to the like costs as if he had pleaded the general issue only; and if, upon issue so joined, the jury shall find that no amends were tendered, or that the same were not sufficient, and also against the defendant in such other pleas, they shall think proper.

By 23 Geo. III. c. 70. § 32; 24 Geo. III. sess. 2. c. 47. § 36. 28 Geo. III. c. 37. § 27. no plaintiff, where an action shall be grounded on any act done by the defendant, shall be permitted to produce any evidence of the cause of such action, except such as shall be contained in the notice to be given as aforesaid, or shall recover any verdict against such officer or person acting in his aid, unless it shall be proved on the trial that such notice was given; and, in default of such proof, the defendant shall recover a verdict and costs as aforesaid.

By 23 Geo. III. c. 70. § 33; 24 Geo. III. sess. 2. c. 47. § 35; 28 Geo. III. c. 37. § 28. if such officer, or person acting in his aid, shall neglect to tender amends, or shall have tendered insufficient amends, before the action brought, it shall be lawful for him, by leave of the court in which such action shall be brought, at any time before issue joined, to pay into court such sum as he shall think fit, whereupon such proceedings shall be had as in other actions where the defendant is allowed to pay money into court.

Excise Licences.

By 26 Geo. II. c. 31. § 4. no licence shall be granted to any person to keep an alehouse, inn, victualling-house, or to sell ale, beer, and other liquors by retail, but at a general meeting of the justices acting in the division where such person resides, holden on the 1st of September, or within twenty days after; and such licence shall be made for one year only, to commence on the 29th of September.

Nothing herein shall extend to alter the time of granting licences in any city or town corporate. § 16.

By 3 Geo. IV. c. 77. every person to be licensed shall enter into a recognizance in the sum of 30*l.* with two sureties in 10*l.* each,

or one in the sum of 20*l.* under the usual condition, for maintenance of good order and rule: and if he shall be hindered, through sickness, infirmity, or any other reasonable cause, from attending in person, the licence may be granted upon two sufficient sureties entering into such recognizance, each in the penalty of 30*l.*; which recognizance, with the condition thereof, fairly written or printed, shall forthwith, or at the next quarter sessions at farthest, be sent to the clerk of the peace, under the hands of the justices, to be by him duly entered and filed; and for every licence granted without taking such recognizance, and for every such recognizance taken and not sent as aforesaid, every justice who signed it shall forfeit 3*l.* 6*s.* 8*d.* No police officer, patrol, constable, or head-borough, are to be sureties.

But no licence shall be granted to any person not licensed the year preceding, unless such person produce, at the general meeting of the justices in September, a certificate under the hands of the minister and the major part of the churchwardens and overseers, and four substantial householders, or else eight reputable and substantial householders and inhabitants of the parish or place where such alehouse is to be, setting forth, that he is of good fame and of sober life and conversation; and it shall be mentioned in the licence that such certificate was produced, otherwise it shall be null and void.

Nothing herein shall extend to oblige persons not licensed the year preceding to produce certificates in any city or town corporate. § 16.

By 32 Geo. III. c. 59. § 1. if any licensed person shall die, or if any licensed person, or the executors, administrators, or assigns of any licensed person dying, shall remove from any licensed house, or if any such house shall become unoccupied, the late occupier whereof was licensed at the last general licensing-day in September, then (except as herein otherwise provided) two or more justices for the division, at a petty sessions, may grant a licence to the executors, &c. of the person dying, or to any new tenant upon removal or house becoming unoccupied, to continue open such house till the next general licensing day; or such justices may allow such executors, &c. possessed of the licence, to continue open such house until the expiration thereof, such executor, &c. obtaining, within thirty days after such death or removal, or after his entering upon the possession of such house, a certificate, and entering into recognizances as before directed; which certificate and recognizance, with the condition thereof, fairly written or printed, and attested by the justices, shall forthwith, or at the next quarter sessions at farthest, be sent to the clerk of the peace, to be by him duly entered and filed.

In the counties of Middlesex and Surrey, the justices at the general licensing meetings for the respective divisions are to appoint not less than six, nor more than eight special days of meeting at different equal periods in the year ensuing; on which days two or more justices may meet, and grant or continue licences as before mentioned; and the justices at the general licensing meet-

ings, are to cause due notice to be given of the times and places at which such special meeting shall be holden. § 2.

If any person so licensed within the said counties, or the executors, &c. of any licensed person dying, shall remove from, or yield up the possession of such house, or if any such house shall become unoccupied, then, before such licence shall be continued, or a new licence granted to continue open such house, the person succeeding shall appear at the next special meeting for the division, and the justices assembled may (upon such certificate being produced, and such recognizance entered into, as before mentioned) grant a licence to such new tenant, or allow a continuance of any licence before granted, in manner aforesaid. § 3.

Nothing in this act shall extend to empower justices at petty sessions to grant new licences for houses not licensed at the general licensing day. § 4.

Nothing herein shall extend to alter the time of granting licences, or to oblige persons not licensed the year preceeding to produce certificates in London. § 5.

Where the continuance of a licence shall be allowed, or a new licence granted as aforesaid, at petty sessions, the clerk of the peace for the division shall record the same, and shall be paid 1s. each. § 8.

By 26 Geo. II. c. 31. §. 3. no licence shall entitle any person to keep an alehouse in any other place than in that in which it was first kept by virtue of such licence.

By 29 Geo. II. c. 12. §. 26. every person who shall retail ale, beer, or other liquors, in any prison or house of correction, or work-house appointed for the reception of poor persons, shall be deemed a keeper of a common alehouse or tippling-house, and shall be subject to the penalties on the keepers of common alehouses and tippling-houses, unless he shall obtain a licence for that purpose.

By 3 Geo. IV. c. 77. persons offending against their recognizances are, for the first offence, to forfeit a sum not exceeding five pounds, with the costs and expences of conviction, or in default of payment within fourteen days to be imprisoned for one month; for the second offence, a sum not exceeding ten pounds, and also the costs and expences of convicting such offender, or in default of payment within seven days, to be imprisoned for two months; and, for the third offence, it shall be lawful for any justice of the peace, upon complaint or information on oath that such licensed person hath committed such third offence, to issue a summons under his hand and seal, requiring him or her to appear at the next general or quarter sessions of the peace, to answer to the matter of such complaint or information, and to bind the person or persons over to give evidence against such persons so complained of or informed against. And if the jury shall find such person guilty, the justices may fine the party in a penalty of 100*l.* or may declare the recognizance to be forfeited, and the licence void, in which case the party shall be utterly disabled for three years to sell ale, spirituous liquors, &c. and any licence granted to them for that period shall be void.

By 35 Geo. III. c. 113. § 7. every alehouse-keeper, victualler, or retailer of beer or ale, who shall receive into his custody any beer or ale to sell by retail, shall, three days before he begins to dispose thereof, make an entry, at the next office of excise, of every house or place to be used, on pain of forfeiting 50*l.*; and all places so used without being entered, shall be deemed concealed.

By 3 Geo. IV. c. 77. § 18. no justice of the peace or magistrate who is a brewer, maltster, distiller, or dealer in or retailer of ale, beer, or other exciseable liquors, or is concerned in partnership with any person as a brewer, maltster, distiller, or dealer in or retailer of ale, beer, or other exciseable liquors, or shall be the manager or agent of or for any house licensed or about to be licensed for any of the purposes aforesaid, at any of the time or times when any of the powers of this act are to be executed, shall act in any of the meetings for granting of any licence or licences, authority or authorities, or shall convict, or join in any conviction, or in the determination of any application for a licence or authority to a person to keep any house not before licensed, or in the determination of any appeal directed by this act; and every justice of the peace, or magistrate, who shall knowingly or wilfully offend in any of the premises, shall for every such offence forfeit and pay the sum of 100*l.* one moiety thereof to go to the person who sues for the same, and the other moiety to the king.

By 35 Geo. III. c. 113. § 17. nothing in this act shall prohibit any person from selling ale or beer in booths or other places at the time and place of holding fairs.

Licensing Houses in Scotland.

By 44 Geo. III. c. 55. § 5. no person shall keep any alehouse, tippling-house, or victualling-house, or sell ale, beer, spirits, strong waters, or other exciseable liquors, by retail, in Scotland, but such persons only as shall be annually allowed and licensed according to the directions in this act.

The magistrates of each royal borough shall yearly on the 15th of May, or the next lawful day thereafter, assemble at the time and place when and where they usually have met for transacting the business of the borough; and they or any two of them, shall, at such annual meeting, license for the year ensuing such and so many persons as they, or any two of them, shall think meet and convenient, to keep alehouses, tippling-houses, victualling-houses, or to sell ale, beer, or other exciseable liquors, by retail, within such borough, or the royalty thereof; and the said magistrates shall cause to be delivered to each person so licensed, a licence, signed by two of them, and by the clerk of the borough, denoting the payment of the duty; for each of which licences a fee of 1*s.* over and above the excise duties, and no more, shall be paid. § 6.

The justices of peace in each shire and stewartry are to meet for the same purposes on the 22d of May in each year. § 8.

If in any royal borough there shall not be a sufficient number of magistrates capable to grant licences pursuant to this act, at any of the times when licences for alehouses, &c. in the royal borough

are to be granted; then it shall be lawful for the justices of peace for the shire or stewartry in which such royal borough shall be situated to grant licences for the same, at the same time and in the same manner as they do for the shire or stewartry. § 7.

Neither the commissioners of excise, nor the collectors or supervisors of excise, or any officers appointed by the commissioners to deliver licences to retailers of spirituous liquors or strong waters, shall grant any such licence to any person who shall not produce a licence granted to him in due form of law by magistrates or justices of peace to sell ale, beer, or other exciseable liquors, by retail. § 2.

If any person licensed to sell ale, beer, or other exciseable liquors, shall die or remove from the alehouse or place wherein such liquors shall by virtue of his licence be sold, it shall be lawful for the executors, administrators, and assigns of the person possessed of such house or place, or the occupier thereof, to sell ale, beer, or other liquors therein, during the residue of the term. § 10.

In case the magistrates of any royal borough, or the justices of peace of any shire or stewartry, shall neglect to assemble upon the days and at the times and places before mentioned, in order to admit and license, then it shall be lawful to the clerk of such borough, or his deputy, and to the clerk of the peace of such shire or stewartry, or his deputy, after making an entry or record, that the magistrates or justices had neglected to assemble in pursuance of this act, to deliver to every person living within such borough, shire, or stewartry respectively, who shall apply for the same, (unless such person shall be disqualified to have a licence), a licence as by this act is directed, signed by him; which licence shall be effectual. § 12.

In case any such clerk or his deputy shall, in either of the cases before expressed, refuse to sign and deliver such licence, he shall forfeit to each person to whom such licence ought to have been delivered ten pounds, with costs, to be sued for in the sheriff or steward court. § 14.

By 29 Geo. II. c. 12. § 18. no justice of peace or magistrate, who is a brewer, maltster, distiller, or retailer of ale, beer, or other exciseable liquors, or is concerned in partnership or otherwise with any brewer, &c. shall act in any of the meetings for granting licences, or convict, or join in any conviction directed by this act, on pain to forfeit 50*l.* to be recovered by any person who will sue for the same, within six months after the offence, in the court of exchequer: which penalty shall be paid, one moiety to the person who sues, and the other to the collector of the cess for the shire or stewartry within which such justice, &c. has offended, to be applied for the reparation of the highways or bridges.

Licence for retailing Beer, Ale, Cyder, and Perry.

By 48 Geo. III. c. 143. § 2. every person who shall sell beer or ale by retail, or who shall sell cyder or perry, to be drunk or consumed in his house or premises, shall take out an excise licence, which shall be granted as after mentioned: viz. If any such licence

shall be taken out within the limits of the chief office of excise in London, it shall be granted under the hands and seals of two of the commissioners of excise in England, or of such person as they shall appoint; and if taken out in any part of England not within the said limits, it shall be granted under the hands and seals of the collector and supervisor of the district; and in case such licence shall be taken out within the limits of the city of Edinburgh, it shall be granted under the hands and seals of two of the commissioners of excise in Scotland; or if taken out in any part of Scotland out of the said limits, it shall be granted under the hands and seals of the collector and supervisor of the district.

And all licences granted by virtue of this act shall continue in force until and upon the 10th of October ensuing the granting thereof. § 3.

In cases where the licence granted by justices of the peace or magistrates, or other competent persons, to keep a common inn, ale-house, or victualling-house, shall, in pursuance of any charter, custom, or usage, be issued at any time of the year except in the month of September, the excise licence required by this act shall be taken out within ten days after the date of the licence, or authority of the justices, &c. and continue in force for twelve months. § 4.

No person shall sell beer or ale by retail, or cyder or perry to be drunk in his house or premises, after the expiration of his licence, unless he shall take out a fresh licence within ten days after the expiration of such former one, and so in like manner renew such licence from year to year: and if any person shall sell beer or ale by retail, or cyder or perry to be drunk in his house or premises, without first taking out a licence, and renewing the same as herein directed, he shall forfeit 50*l*. § 5.

Upon the death or removal of any person so licensed, it shall be lawful for one of the commissioners of excise, or the proper collector, and supervisor, upon a certificate of a justice of peace or magistrate, or other competent person, approving of the person to whom such certificate shall be given, to authorize such person to sell in the same house or premises during the residue of the term. § 6.

Neither the commissioners of excise, the persons appointed by them, nor the collectors or supervisors of excise, shall grant any licence to sell beer or ale by retail, or cyder or perry to be drunk in the house or premises of the person applying for the same, or any licence to sell spirituous liquors or strong waters, or wine or liquors by retail, to any person who shall not produce a licence or authority granted to him by the justices of peace, or magistrates, or other competent persons. § 7.

Every person having a licence to keep a common inn, ale-house, or victualling-house, disabled by conviction from keeping the same, shall also, by such conviction, be disabled to sell beer or ale by retail, or cyder or perry to be drunk in his house or premises, under any excise licence; and such licence from the time of such conviction shall be void: and in cases of prosecution of persons whose excise licences shall so become void, a certificate from the clerk of

the peace of such conviction shall be legal evidence, which certificate such clerk is to give without a fee. § 11.

By the 5 Geo. IV. c. 54. § 6. any brewer or brewers of strong beer only in Great Britain for sale; who shall have taken out and paid for his, her, or their licence to brew at and after the rate of two pounds at the least, may retail such beer from the premises where such beer is or has been brewed, and any person not being a brewer of beer, either for sale or private use, may sell strong beer only brewed by any other brewer, in casks containing not less than five gallons, or in not less than two dozen reputed quart bottles at one time, upon such brewer or other person respectively taking out an excise licence for that purpose.

Provided, that no such licence, shall authorize such brewer or other person taking out any such licence, to sell any table beer, or any beer to be drank or consumed upon the premises where sold, or in any shop, house, outhouse, yard, garden, orchard, or other place adjoining the same, or belonging to or occupied by the person taking out such licence or selling such beer, or in which he shall have any concern, or to sell, deal in, or retail any other beer whatever.

Where the entered premises for brewing of any brewer shall be situated out of a city or market town, it shall be lawful for any such brewer to make entry of some one place, room, storehouse, cellar, shop, house, or outhouse, for the retail of beer in any one adjoining city or market town, and to take out a licence for and retail therefrom the strong beer brewed by him at such brewery, to be drank or consumed elsewhere, subject nevertheless to the several provisions and penalties herein contained and imposed, relating to any brewer retailing beer from the premises where brewed. § 7.

Persons disabled by conviction from keeping a common inn, &c. shall not be allowed to take out a retail brewer's licence: and if any such person shall after such conviction sell beer by retail, he or she so offending shall for every such offence forfeit the sum of 50*l*. § 15.

Licences for Canteens.

By 53 Geo. III. c. 17, § 49. it shall be lawful for any two justices of the peace or magistrates, within their respective jurisdictions, to grant or transfer any licence for selling ale by retail, or cyder or perry to be drank or consumed in any house or premises held as a canteen, or any licence to sell spirituous liquors or strong waters, or wine or liquor, by retail, to any person who shall hold any canteen under lease or agreement from two of the principal officers of the board of ordnance, or two of the commissioners of barracks, without regard to the time of the year, or any notices or certificates required in relation to the granting such licences.

It shall be lawful for the commissioners of excise in England, Ireland, Scotland, or for any collectors or supervisors, within their respective districts, to grant licences for selling beer or ale by retail, or cyder or perry to be drank or consumed in the houses or

premises occupied as a canteen, or any licence to sell spirituous liquors or strong waters, or wine or liquors by retail, to the person who shall hold such canteen under any licence, or transfer of such licence, of any justice or magistrate.

General Licences.

By 24 Geo. III. c. 41. § 6. no person shall make any exciseable commodity for sale, without first taking out a licence for that purpose, for which he shall pay the sums imposed by law; and no person shall deal in brandy, not being a retailer, nor a rectifier, nor a distiller, without first taking out a licence for that purpose. And if such licences shall be taken out within the limits of the chief office of excise in London, they shall be granted under the hands and seals of two commissioners of excise, or of such persons as they shall appoint, and the duties shall be paid at the chief office of excise in London; or if taken out in any part of England or Wales, not within the said limits, or in the town of Berwick-upon-Tweed, they shall be granted under the hands and seals of the collectors and supervisors, within their respective districts, and the duties shall be paid to the collector, within whose collection they shall be so granted; and if taken out within the limits of the city of Edinburgh, they shall be granted under the hands and seals of two of the commissioners of excise in Scotland, or of such persons as they shall appoint, and the duties shall be paid at the chief office of excise in Edinburgh; or if taken out in any other part of Scotland, without the limits aforesaid, they shall be granted under the hands and seals of the collectors and supervisors within their respective districts, and the duties shall be paid to the collector within whose collection they shall be so granted.

Every person who shall take out any such licence, is to take out a fresh licence ten days before the expiration of twelve calendar months after taking out the first licence, and in the same manner to renew such licence from year to year, paying the like sum for each new licence as is by this act required for the first one.

Persons in partnership, and carrying on their trade in one house or shop only, shall not be obliged to take out more than one licence; and no one licence shall authorize any person to make any of the commodities herein mentioned, in any other house or place than the houses or places wherein he did make the same at the time of granting such licence. § 8.

Transfer of Licences.

By 58 Geo. III. c. 103. upon the death of any person licensed, or upon the removal of any person from the house or premises in which his licence shall authorize him to make or manufacture, deal in, vend, or sell, any exciseable commodity, any one of the commissioners of excise, or the proper collector and supervisor, may authorize the executors, administrators, or the wife or child of the deceased person, or the assignee or assigns of the person removing, to carry on the trade in the same house or premises during the residue of the term.

CUSTOMS.

Hours and Places for shipping and landing Goods.

By law, no goods (except fish British-taken, sea-coal, stone, and bestials) can be laden or put off from any quay or wharf into any ship, lighter, or boat, to be transported any where beyond seas; nor shall any goods brought from beyond seas (except fish British-taken, bestials, and salt) be taken up or laid on land out of any ship, lighter, or boat, not being leak or wreck, but at lawful hours, viz. from the 1st of March to the 30th of September between sun-rising and sun-setting, and from the 30th of September to the 1st of March between seven in the morning and four in the afternoon, and only upon such open places, quays, or wharfs, as shall be appointed by his majesty's commission out of the court of exchequer in England or Scotland respectively, without special sufferance and leave from the officers of customs; on forfeiture of such goods, or the value thereof, and 100*l.* by the owner and master, or other person taking charge of the vessel or of the merchant's goods during the voyage. And all ports, and the places, members, or creeks belonging thereto, as shall be lawful for landing and discharging, lading or shipping of goods, and also the extents, bounds, and limits of the said ports, havens, or creeks, shall be appointed by such commission as aforesaid; and the customers, collectors, comptrollers, and searchers of the head-ports, or their sufficient deputies or servants, shall reside at such members, creeks, or places, and give due attendance, for entering, clearing, and passing shipping, and discharging of ships, and faithfully to perform all other due discharge of duty, on forfeiture of office and 100*l.*

Goods imported into the port of London may be landed and unladed at any of the lawful quays and places of shipping and landing goods between the Tower of London and London Bridge, and between sun-rising and sun-setting from the 10th of September to the 10th of March, and between six in the morning and six in the evening from the 10th of March to the 10th of September, giving notice to the proper officers; and officers refusing to be present shall forfeit 5*l.* for every default.

By 13 & 14 Car. II. c. 11. § 21. all goods which shall be permitted to be landed and taken up by bills at sight, bills at view, or sufferance, shall be landed only at such convenient quays or wharfs, as the customer, collector, or comptroller, shall appoint.

By 67 Geo. III. c. 116. § 2. it shall be lawful for any person to receive or take, at any time before and until sun-set, from the 30th

of September to the 1st of March, into any ship or vessel bound to parts beyond the seas, any goods, wares, or merchandize, which may be lawfully exported, and which have been put off or waterborne from any quays in the port of London, within the legal hours for putting off the same.

By 36 Geo. III. c. 82. § 1. if any goods imported (except diamonds, jewels, pearls, precious stones, bullion; fresh fish British taken, imported in British ships, navigated and registered according to law; and except turbot and lobsters, however taken or imported), whether such goods are liable to duty or not, shall be unshipped or landed without the presence of the proper officer of customs, either on Sundays, holidays, or any other days, all such goods shall be forfeited, and may be seized by any officer of customs.

By 43 Geo. III. c. 68. § 3. pearls, emeralds, rubies, and all other precious stones and jewels, except diamonds, shall be regularly entered at the custom-house, and landed in the presence of the proper officer in like manner as other goods on which duties are granted.

Fish of every kind whatever, of British taking and curing, caught by the crews of vessels built in Great Britain, or Ireland, or the Islands of Jersey, Guernsey, or Man, or in any of the colonies, plantations, islands, or territories in the possession of his Majesty, and wholly belonging to and owned by his Majesty's subjects, and navigated and registered according to law, may be imported into Great Britain in such ships without payment of any duty. But, before such fish shall be admitted to entry, the master or person having the command of the vessel shall make oath, before the collector or other chief officer of customs at the port of importation, that such fish was caught and cured wholly by his Majesty's subjects. § 6, 7.

Outward Entry before and after Lading.

By 1 Eliz. c. 11. § 4. no master or other person taking charge of the ship, shall receive or take into any ship whatever, any goods (except fish British-taken, sea-coal, stone, and bestials) to be transported into parts beyond seas, before he has signified to the customer of the port where he lades, and other officers in the open custom-house, that he intends to lade, and to what place bound; nor shall depart such port before he in like manner signify to them his lading, and what merchants and others have laden with him, and truly answered such questions as shall be administered to him by the customer or other officer concerning the goods he has laden, being examined on his oath or otherwise in the open custom-house, under the penalty of 100*l*.

And by 13 & 14 Car. II. c. 11. § 3. no master or other person taking charge of any ship, British or foreign, of war or otherwise, bound for parts beyond the seas, shall take in, or suffer to be taken into or laden aboard such ship, any British goods for exportation, until he shall have entered such ship in the book of the customer, or collector and comptroller of the port of lading, together with the name of such master, the burden of such ship, the

number of guns and ammunition she carries, and to what place she intends to sail; and, before he shall depart with his ship out of such port, shall deliver to the said officers a content in writing under his hand of the names of every merchant and other person that shall have laden any goods on board such ship, together with the marks and numbers of such goods; and shall likewise publicly in the open custom-house, upon his oath, to the best of his knowledge, answer to such questions as shall be demanded of him by the said officers, or their deputies, concerning the goods on board; upon forfeiture of 100*l*.

The merchant having entered his goods outward, and received his cocket or certificate, he is to keep it until he shall ship out his goods so entered, when he is to deliver it to the searcher, together with the mark and number of the goods.

Inward Entry, or Report of Ship's Arrival.

By 1 Eliz. c. 11. § 5. no master or other person taking charge of any ship whatever, wherein any goods (except fish British-taken, sea-coal, stone, and bestials) shall be laden, and brought from any part beyond sea, shall discharge any goods thereout, until he has declared to the customer, or other officer at the port of arrival, the names of the merchants or laders, and truly answered such questions concerning the goods on board, as shall be administered to him by such customer, &c. openly in the custom-house, or otherwise, on oath, if required; under the penalty of 100*l*.

By 13 & 14 Car. II. c. 11. § 2. no ship arriving from parts beyond the seas shall be above three days coming from Gravesend to the place of her discharge, in the river Thames, without touching or staying at any wharf, quay, or place adjoining to either shore, between Gravesend and Chester quay, unless apparently hindered by contrary winds, draught of water, or other just impediments to be allowed by such persons as are appointed for managing the customs, &c.; and then, or before, the master or purser for that voyage shall make a just and true entry upon oath of the burden, contents, and lading of such ship, with the particular marks, numbers, qualities, and contents of every parcel of goods therein laden, to the best of his knowledge; and also where, and in what port she took in her lading, of what country built, how manned, and who was master during the voyage, and who are owners thereof; and, in all out-ports or members, shall come directly up to the place of unloading, as the condition of the port requires, and admit and make entry as aforesaid; upon forfeiture of 100*l*.

By 26 Geo. III. c. 40. § 11. the master or other person taking charge of any ship in which goods shall be imported into Great Britain, shall, within twenty-four hours after the arrival of such ship at such places as shall be appointed by the commissioners of customs, make entry, upon oath, of her built, burden, and lading, with the marks, numbers, and contents of every parcel of goods on board, to the best of his knowledge and belief, and perform every thing in relation thereto, before the customer, collector, or

other chief officer of customs, in the manner directed by 13 & 14 Car. II. c. 11. under the penalty of 100*l*.

Any merchant may break bulk in any lawful port, and pay customs for no more than he shall enter and land; provided the master or purser of the ship shall first make declaration upon oath, before any two principal officers of the port, of the true content of his ship's lading; and shall likewise make declaration upon oath, before the customer, collector, comptroller, or surveyor, or any two of them, at the next port in this kingdom where his ship shall arrive, of the quantity and quality of the goods landed at the first port, and to whom they did belong.

By 13 & 14 Car. II. c. 11. § 3. no captain, master, purser, or other person taking charge of any ship of war, British or foreign, wherein any goods are brought from parts beyond the seas, shall suffer any such goods to be discharged, before he, or the person taking charge of the merchant's goods for that voyage, shall have declared in writing under his hand, to the customer, or collector and comptroller of the port where he arriveth, the names of every merchant or lader of any goods aboard, together with the numbers and marks, and the quantity and quality of every parcel of goods, to the best of his knowledge, and shall have answered upon his oath to such questions concerning such goods as shall be publicly administered unto him in the open custom-house by the said officers or their deputies, upon pain to forfeit 100*l*.; and such ship shall be liable to all searches and rules which merchant-ships are subject to, by the usage of his majesty's custom-house, except victualling bills and entering; and upon refusal to make such entries as by this act is directed, as well outwards as inwards, the officers of customs may freely enter and go on board such ships, and bring from thence on shore into his majesty's storehouse all goods prohibited or uncustomed which shall be found aboard.

By 13 & 14 Car. II. c. 11. § 22. no ship or boat appointed for the carriage of letters and packets shall (unless in such cases as shall be allowed by the proper officers of customs) import or export any goods into or out of parts beyond seas, upon forfeiture of 100*l*. to be paid by the master, with the loss of his place: and all the goods found on board shall be forfeited.

Powers of Officers.

By 13 & 14 Car. II. c. 11. § 4. the officers of customs are authorized to go and enter aboard any ship, as well ships of war as merchant ships, and from thence to bring on shore all goods prohibited or uncustomed, except jewels, if they be outward bound; and if they be ships inward bound, from thence to bring on shore into his majesty's storehouse, all small parcels of fine goods, or other goods which shall be found in cabins, chests, trunks, or other small package, or in any private or secret place, in or out of the hold of the ship, which may occasion a just suspicion that they were intended fraudulently to be conveyed away, and all other sorts of goods whatever for which the duties of customs were

not paid or compounded for within twenty days after the first entry of the ship, to be put and remain in the said storehouse until the duties thereupon be satisfied, unless such officers shall see just cause to allow a longer time.

Officers of excise may go on board, and search and seize, as officers of customs, for spirits, &c.

Manifests.

By 26 Geo. III. c. 40. § 1. no goods shall be imported into Great Britain, in any ship or vessel belonging in whole or in part to his majesty's subjects, unless the master or person having the charge of such ship shall have on board a manifest, signed by him, containing the name of the port where the goods mentioned therein shall have been shipped, the name and built of the ship, with the tonnage, according to the register thereof, with the name of the master, and of the port to which she belongs, and a particular account of the cargo, and of all packages of goods on board, with the marks thereon; and the particulars of the cargo stowed loose; and the following particulars in words at length, *viz.* the number of the packages, with a particular description thereof, whether leaguer, pipe, case, bales, box, &c.

This act shall not extend to permit any goods, which are now by law required to be accompanied with certificates, to be imported without the same. § 2.

Before any ship shall be cleared out for Great Britain from any port or place of the British dominions in foreign parts, the master shall deliver a manifest to the chief officer of customs; and if no officer of customs shall be there, then to the principal officer or magistrate, or some other person specially appointed by him for that purpose, who shall take a duplicate thereof, and indorse on the original his name, with the day it was produced, and then return the original to the master before the clearing of the ship; at which time he shall transmit the duplicate, under his hand and seal, to the collector and comptroller of customs at the port in Great Britain to which the goods are consigned. § 3.

By 26 Geo. III. c. 40. § 5. if any goods shall be imported into Great Britain in any ship, belonging in whole or in part to his majesty's subjects, from any port in foreign parts, without such manifest, or shall not be described therein, or shall not agree therewith, the master, or person having charge of such ship, shall forfeit double the value of the goods, with the full duties payable thereon.

Every master, or person having charge of any ship belonging in whole or in part to his majesty's subjects, laden with goods as aforesaid, and bound to any port in Great Britain, shall, on his arrival within four leagues of the coast thereof, upon demand, produce such manifest to such officer of the customs as shall first come on board, and deliver to such officer a true copy thereof subscribed by him; who, on the back of the original, shall certify the day it was produced, and such copy delivered to him, and

shall likewise certify upon the back of such copy the day it was produced, and shall forthwith transmit such copy to the collector and comptroller of the ports to which the goods by such manifest shall appear to be consigned; and the said master or person shall in like manner produce to the officer of customs who shall first come on board such ship, upon her arrival within the limits of the port in which the cargo, or any part thereof, is intended to be discharged, such manifest, and deliver to him a true copy thereof subscribed by him; who, after proceeding in the manner directed with respect to the first production, shall transmit such copy to the collector and comptroller of that port: provided, that no such master or person shall be obliged to deliver more than two copies of his manifest, if he shall produce to the officer who shall afterwards come on board, his manifest, with a certificate on the back thereof as aforesaid: provided also, that if any manifest delivered up to the collector and comptroller of any port where such ship arrives, shall contain an account of goods not there to be landed, but which shall appear to be consigned to some other port, such collector and comptroller shall certify upon such manifest, under their hands, such part of the cargo as shall there have been delivered, and deliver back the original manifest to the master, or person having charge of the ship; and so in like manner until such ship shall arrive at her last port of discharge. § 6.

If any such master or person shall not produce his manifest, and give a copy thereof to such officers as aforesaid, or shall not give an account of the destination of his ship, or shall give a false account of the destination thereof, in order to evade the production of the manifest, he shall forfeit double the value of the goods, with the full duties payable thereon; and if any such officer shall neglect to certify on the back of such manifest the production thereof, and the delivery of such copy, he shall forfeit 100*l*. § 7.

The master, or person having charge of the ship, shall, at the time he makes his report or entry of the ship at the custom-house, deliver his manifest to the collector, or chief officer of customs at the port, on pain of forfeiting 200*l*. § 11.

If any package which shall have been reported by the master, or person having charge of the ship, shall be wanting, and not found on board such ship; or if the goods reported shall not agree with the manifest; or if either the report or manifest shall not agree with the cargo found on board such ship; the master, or person having charge of such ship, shall forfeit 200*l*.: provided, that in case any goods shall be imported without such manifest, or in case the manifest shall not agree with the report, or shall be defaced or incorrect, or shall not agree with the goods on board, and it shall be made appear to the satisfaction of the commissioners of customs that the cargo imported was wholly taken on board in foreign parts, naming the particular places, that no part thereof has been since unshipped, and that the manifest has been lost or mislaid without fraud, defaced by accident, or incorrect by mistake; in such case the penalties hereinbefore inflicted shall not be incurred. § 12.

In case any goods shall, from urgent necessity, be taken on board any ship after the manifest shall have been attested, the master, or person having charge of such ship, shall make out and sign a separate manifest of all such goods so taken on board; which manifest shall be subject to every provision to which manifests properly attested are subjected; and in such case the penalties inflicted with respect to goods imported without a manifest shall not be incurred, if the urgent necessity of so taking such goods on board shall be made to appear to the satisfaction of the commissioners of customs.

By the 5 Geo. IV. c. 43. § 18. it is enacted, that every captain or master of any ship or vessel, in which any goods, wares, or merchandize shall be shipped or laden, shall keep or cause to be kept a cargo book, in which shall be entered the particulars of all goods, wares, and merchandize laden on board such ship or vessel, and the dates and times when the same shall be taken on board; and if any captain or master of any ship or vessel, or any person having charge of any ship or vessel, shall sign any false or untrue bill of lading, or any bill of lading specifying and containing any greater or other quantity of goods, wares, or merchandize than shall have been actually delivered and laden on board such ship or vessel by the person or persons for whose use such bill of lading shall be given at the time of his signing such bill of lading, or any bill of lading varying in quantity or date from the entry to be made in such cargo book as aforesaid; or if any captain or master of any such vessel shall neglect or refuse to cause such cargo book to be kept, or such entries to be made therein as aforesaid, or shall make or cause to be made any untrue entry in such cargo book, every such captain or master shall, for every such offence, forfeit the sum of 100*l*.

Goods not stored in Main Hold.

By 26 Geo. III. c. 40. § 9. if, upon the arrival of any ship within the limits of any port in Great Britain, for the discharge of the cargo or any part thereof, there shall be any goods which, from necessity, or from the nature of the cargo, must be unavoidably stowed out of the main hold (except such part of the cargo as is stowed in the chains, or in other parts on the outside of the ship), the officer of customs who shall first go on board shall mark or seal such packages, in such manner as he shall be directed by the commissioners of customs, and shall keep a particular account thereof; which mark or seal shall not be altered, defaced, or broken, before the goods contained in such packages shall be landed, either at the lawful quays, or at such other places as shall be allowed for that purpose by special sufferance, in the presence of a superior officer.

If any of such marks or seals shall be altered, defaced, or broken, with the privy of the master, or person having charge of the ship, he, and also the mate, or person next in command, shall forfeit 200*l*. each. § 10.

Customs' Duties.

By 26 Geo. III. c. 40. § 14. every importer, proprietor, or consignee, of any goods imported into Great Britain, shall, within twenty days after the master or person having charge of the ship shall have made his report or entry, or after the expiration of the time within which he is required by law so to do, make a due entry in writing with the collector or other chief officer of customs at the port where the ship shall arrive, of all the goods by them imported in such ship, or of which they are the importers, and shall pay the duties due thereon, in ready money, within the time aforesaid; and if they shall fail in so doing, it shall be lawful for the officers of customs to convey such goods to his majesty's warehouse at the custom house, for security of the duties; and if the duties are not paid within three months, they shall be sold, and the produce applied agreeably to the 12 Ann. c. 8; but nothing herein shall extend to the selling of any goods which may by law be entered and warehoused upon bond or security being given for the duties.

Where goods brought to his majesty's storehouses for security of the duties have remained there six months unentered, the commissioners of customs may cause them to be sold by public auction, or inch of candle; and the produce is first to be applied to the payment of the freight, primage, warehouse-room, and other charges, next the duties, and the overplus to the proprietor.

By 38 Geo. III. c. 33. § 11. in all cases where goods shall be lost or destroyed by unavoidable accident, after the duties of customs have been paid for the same, and previous to the landing, it shall be lawful for any four of the commissioners of customs in England, or any three in Scotland, to return the said duties to the importers or proprietors of such goods, in such manner as they shall judge expedient; provided proof shall be made to the satisfaction of the said commissioners, that such goods were lost or destroyed by unavoidable accident, and not from want of due care on the part of the proprietor or his agent.

By 12 Car. II. c. 4. § 4. all goods liable to the payment of duties, imported into any port, place, or creek of Great Britain, by way of merchandize, and unshipped to be laid on land, before the duties are duly paid, or lawfully tendered to the collector thereof, or his deputy, with the consent and agreement of the comptroller and surveyor there, or one of them at least, or agreed for in the custom-house, shall be forfeited; one moiety to the king, and the other to him who will seize or sue for the same.

By 13 & 14 Car. II. c. 11. § 7. if any goods shall be taken into any bark, hoy, lighter, barge, wherry, or boat, out of any ship arriving from foreign parts, without a warrant, and the presence of one or more officers of customs, such bark, &c. shall be forfeited, and the master, purser, boatswain, or other mariner of any ship inward bound, knowing and consenting thereto, shall forfeit the value of the goods so unshipped.

By 24 Geo. III. sess. 2. c. 47. § 28. all goods found on board any ship, of which no report hath been made, shall be forfeited.

By 5 Geo. I. c. 11. § 4. all goods not reported, and found after clearing the ship by the officers of customs, shall be forfeited.

By 13 & 14 Car. II. c. 11. § 5. if, after the clearing of any ship by the proper officers of customs, and discharging the watchmen or tidesmen, there shall be found on board such ship any goods which have been concealed from the said officers, and for which the duties have not been paid, the master, or person having charge of the ship, shall forfeit 100*l*.

By 9 Geo. II. c. 35. § 27. all goods found concealed on board any ship, after the master shall have made his report at the custom-house, and which shall not be mentioned in the said report, shall be forfeited, and may be seized and prosecuted by any officer of customs; and the master, or person having charge of such ship, (in case he was privy to the concealment) shall forfeit treble the value of the goods so found.

By 5 Geo. III. c. 43. § 1. all goods which shall be found concealed in any package, or among any of the goods contained therein, after the same shall have been carried to his majesty's storehouse, in pursuance of 13 & 14 Car. II. c. 11. and which shall not have been entered within twenty days after the ship's report, and the duties paid or secured, or which shall be found concealed in any package, or among any of the goods therein contained, which shall be brought on shore by special sufferance from the commissioners of customs at the application of the proprietor, and which shall not be particularly specified in such application, shall be forfeited, and may be seized by any officer of customs.

By 24 Geo. III. sess. 2. c. 47. § 28. where the master of any ship shall report any bales or other packages, *contents unknown*, for exportation in the same ship, it shall be lawful for any officer of customs to open such bales and packages, and examine the contents thereof, or to bring them on shore to his majesty's warehouse, if necessary, and such officer shall be indemnified for so doing; and in case it shall appear that such bales or packages shall contain goods prohibited to be imported, shall be forfeited; and if not so prohibited, they shall be discharged with the duties due thereon, and shall not be permitted to be exported before the duties are paid, without leave from the commissioners of customs.

By 27 Geo. III. c. 32. § 10. where the master of any ship shall report any bales or other packages for exportation in the same ship, whether the contents thereof shall be mentioned in the report or not, it shall be lawful for any officer of customs to open such bales and packages, and examine the contents thereof, or to bring them on shore to his majesty's warehouse if necessary; but this act shall not extend to any ship coming from any part of Asia, Africa, or America.

By 13 & 14 Car. II. c. 11. § 4. if any master, purser, boat-swain, or other taking charge of any ship, or any other person whatever, shall suffer any truss, bale, or other package, to be

opened on board the ship, and the goods therein to be embezzled; carried away, or put into any other form or package, after the ship comes into her port of discharge, the said master, &c. shall forfeit 100*l*.

By 46 Geo. III. c. 20. § 16. there shall not be paid, upon the exportation of any goods entitled to either drawback or bounty upon exportation, any drawback or bounty, if the goods are in bales press-packed, unless the species, quantities, and qualities thereof shall be verified by the master packer, or, in his absence, by his servant, who shall have actual knowledge of the contents of the bales, in the following manner: *viz.* If the goods are packed at the port whence they are to be exported, or within ten miles thereof, then by oath, subscribed on the entry or cocket, before the collector or comptroller, or other chief officer of customs at such port; and if packed at any greater distance, then on the like oath, made before some magistrate or justice of peace for the county or place where such master packer shall reside.

Delivering Cockets for Goods exported.

By 43 Geo. III. c. 128. § 1. it shall not be lawful for any person to lade or put off or from any quay, wharf, or other place on land, into any ship, vessel, lighter, boat, or bottom, any goods whatever, with intent to export the same to parts beyond the seas, until he shall have delivered to some one of the comptrolling searchers of customs a true copy of the cocket or entry (with the indorsement thereon) for all such goods so intended to be exported; and it shall be lawful for the said searchers, or other officers of customs, to detain any goods for which the shipping-bill, or copy of the cocket, with the indorsement thereon, shall not have been delivered as aforesaid.

By 26 Geo. III. c. 40. § 17. every master, or person having charge of any ship, on board of which any goods shall be shipped for exportation from Great Britain, shall, upon demand, deliver to every officer of customs who shall come on board, either within the limits of any port in Great Britain, or within four leagues of the coast thereof, every cocket delivered to him by the proper officers of customs at the port where the ship shall have been cleared out, for the inspection of such officers, under the penalty of 100*l*.; and if such officer shall find any of the goods on board not to correspond with the cocket, he may seize the said goods, which shall be forfeited; or if he shall discover that any of the packages indorsed upon the cocket are not on board, the master, or person having charge of the ship, shall forfeit 20*l*. for each such package.

Drawback, Bounty, or Premium.

By 26 Geo. III. c. 30. § 20. no goods entitled to drawback, bounty, or premium, shall be put on board any ship for exportation to foreign parts by any persons (except the proper officers of the revenue), other than such person as shall be authorized for that purpose by licence from the commissioners of customs, who

are hereby authorized to grant the same, and to require such security as they shall deem necessary, by bond or otherwise, to be given by the persons to whom they shall grant such licence, for the actual delivery of the whole of the goods on board such ship to the officers of the revenue stationed on board, and for the faithful and incorrupt dealing in every respect of such persons in regard to such goods; which person shall, upon carrying such goods on board any ship, give information thereof in writing to the master, or person then in charge of the ship, for enabling the master to give notice, as required by this act, previous to his clearing out with drawback or bounty goods; which licence, when granted, shall not be withdrawn, unless the person licensed, or some other person employed by him, and with his privity, shall be convicted of some act against any law now made, or hereafter to be made, to secure the revenue of customs or excise.

The commissioners of customs shall grant such licences to all persons who are now by law entitled to put on board such goods, and who shall give such security as the said commissioners shall deem necessary, and to no other person. § 21.

By 27 Geo. III. c. 13. § 3. nothing in this act shall extend to allow the exporter from Great Britain to foreign parts of any foreign goods, any drawback of the duties of customs paid upon the importation thereof into Great Britain, unless such goods shall be duly entered for exportation with the proper officer of customs, and actually shipped on board the vessel in which they are to be exported, within three years from the time such goods were originally imported (such time to be accounted from the master's report inwards of his ship), and unless sufficient proof be also made, by certificate from the proper officers, of the due entry and payment of the duties inwards upon such goods, and by the oath or affirmation of the merchants importing and exporting, verifying the truth thereof, and the name of the searcher or under-searcher in the port of London, or of the searcher of any of the out-ports, testifying the shipping thereof; and unless such drawback be claimed within two years after such goods shall be shipped for exportation.

By 49 Geo. III. c. 98. § 39. all foreign goods which have been regularly imported into Great Britain, and exported from thence to parts beyond the seas, and afterwards re-imported, shall be subject to the duties of customs granted upon the importation thereof.

Goods Coastwise.

By 13 & 14 Car. II. c. 11. § 7. any goods shipped or put on board any ship to be carried forth to the open sea from any one port, creek, or member in Great Britain, to be landed at any other place thereof, without a sufferance or warrant first obtained from the officers of customs, shall be forfeited; and the master of every ship taking in goods to be so carried, shall, before the departure of the ship out of the port, take out a cocket, and become bound to his majesty with good security, in the value of the goods, for

the delivery thereof in some port or place in Great Britain, and to return a certificate within six months, under the hands and seals of the proper officers of the port of discharge, upon forfeiture of the bond and security.

By 8 Geo. I. c. 18. § 18. if any goods brought into any port within this kingdom from any port within the same, by coast-cocket, transire, letpass, or certificate, shall be unshipped to be landed, before such cocket, &c. be delivered to the customer, or collector or comptroller of the port, or without a warrant or sufferance from them for the landing thereof, the master of the vessel knowing or consenting thereto shall forfeit the value of the goods unshipped; and the goods also, if of foreign production or manufacture, or the value, shall be forfeited, if they shall be landed without the presence of an officer of customs.

By 32 Geo. III. c. 50. § 1. it shall be lawful for any person to remove or carry forth to the open sea, any goods shipped according to the directions of this act, at any port, creek, or member of any port in Great Britain, to be landed at any other port or place in Great Britain, without taking out any cocket, or giving any bond for the delivery thereof, subject to the exemptions and regulations herein mentioned.

No goods prohibited to be exported from Great Britain, nor any goods liable to duty, return of premium, or bounty, or entitled to any allowance for waste on exportation, or on being brought coastwise, nor any goods warehoused upon the importation thereof, on payment of a certain duty, and afterwards carried coastwise for exportation, nor any goods liable to duty of customs on importation or exportation, unless the amount of such duty on the whole of the cargo shall not exceed five pounds, shall be allowed to be removed to be carried coastwise, in any ship, vessel, boat, or hoy, from any port, creek, or member of a port, in England, Wales, or town of Berwick, until the master or person having the charge thereof shall have taken out a cocket, and become bound for the delivery of such goods as required by law; or to be laden on board any ship, vessel, boat, or hoy in Scotland, for being carried coastwise to any part of Great Britain, unless the master or person having the charge thereof shall have obtained a sufferance, warrant, or permit, for lading the same, and become bound in the value of the goods contained in such sufferance, &c. or in the indorsement made thereon, as herein directed, for the due landing the same, and (the dangers and accidents of the seas excepted) for returning a certificate from the chief officer of customs at the port, member, or creek, where landed, within six months, to the officer of customs to whom such security hath been given, that such goods were there landed, upon the penalty of forfeiting the security. § 1.

All goods allowed by this act to be carried coastwise without cocket and bond, may be laden on board any ship, vessel, boat, or hoy, British-built, owned and navigated according to law, at any port, creek, or member of a port, in England, Wales, or town of Berwick, by sufferance or warrant, and may be carried forth to

the open seas, to be landed in any port or place in Great Britain, by transire or letpass only, and at any port, creek, or member of a port in Scotland, by sufferance, warrant, or permit, and may be removed in like manner by such sufferance, warrant, or permit only, indorsed as herein directed: provided, that nothing in this act shall be construed to require any transire or letpass where the ship or vessel does not go to open sea, or where cocket and bond, or transire or letpass, were not required by law. § 2.

No goods laden at any port, creek, or place in Scotland, by sufferance, warrant, or permit, and without cocket and bond, or without cocket, shall be removed without such sufferance, warrant, or permit accompanying the same, and a certificate of the shipping officer indorsed thereon of the particulars of the goods shipped. § 3.

If the master or person having the charge of any ship, vessel, boat, or hoy, in which any goods shall be shipped, to be carried coastwise in Great Britain, shall proceed without cocket, &c. as herein directed, he shall forfeit 50*l*. § 4.

If any goods brought into any port or place in Great Britain from any other port or place therein, by cocket, &c. as herein required, shall be unshipped to be landed, before such cocket, &c. shall be delivered to the customer, or collector and comptroller of the port, and warrant or sufferance obtained from them for the landing thereof, the master or person having charge of the ship, &c. shall forfeit the value of the goods; and if any such goods shall be landed without the presence of an officer of customs, they shall be forfeited, or the value. § 5.

If goods shipped to be carried coastwise, shall be found by any officer of customs to exceed the quantity expressed in the cocket, &c. the excess shall be forfeited; but if it shall appear to the satisfaction of the commissioners of customs, that such excess has arisen by mistake, they may waive the forfeiture. § 7, 8.

No bond for the delivery or discharge of any goods carried coastwise shall be chargeable with stamp duty. § 11,

By 55 Geo. III. c. 118. § 3. it shall be lawful for the commissioners of customs in England and Scotland, whenever it shall appear to them necessary, for the relief and accommodation of the coasting trade, to authorize any officer of customs stationed at any creek, harbour, basin, or out-station, at which goods or passengers may be shipped to be carried coastwise, to take the coast-bond or transire, or other documents required for the clearance of such vessels, and for the delivery of such goods or passengers in the port or place for which entered, or in some other port or place in Great Britain, and to return the certificates required to be produced from the officers of the customs of the port, member, or creek, harbour, basin, where such goods and passengers are to be landed, certifying that such goods and passengers were there landed: and every bond, transire, or document taken by such officer, shall be as valid as if taken at the custom-house by the collector and comptroller of the port.

Ships from and to Ireland.

By 55 Geo. III. c. 118. § 1. it shall be lawful for the commissioners of customs in England and Scotland, whenever they shall deem it proper, to permit ships arriving from Ireland to enter inwards at such creeks, harbours, or basins, where a principal coast-officer or comptroller, or other principal officer of the customs, shall be stationed, before whom it shall be lawful for the master of the ship to make oath of the bulk, burden, contents, and lading of such vessel, with the marks, numbers, and contents of every parcel of goods on board, instead of proceeding to the regular custom-house of the port; and also to do at such creek, &c. every thing in relation thereto, conformably to the laws in force, under the like penalties and forfeitures as such entries are now required to be made in the custom-house before the collector or chief officer of the port.

It shall be lawful for the said commissioners, whenever they shall deem it proper, to permit the master of such ships as may intend to lade and clear outwards at any such creeks, harbours, or basins for Ireland, to enter such ships with the principal coast-officer and comptroller, or other principal officer, instead of proceeding to the regular custom-house of the port, and to make oath before them to the truth of the content of the lading of such ship; and the master thereof is to answer such questions concerning such ship and voyage as shall be demanded of him by the said officer, under the like penalties as are provided by the laws in force in respect to such oaths and questions as are required to be taken and answered before the collector or chief officer of the port. § 2.

By 56 Geo. III. c. 93. § 1. it shall be lawful for the commissioners of customs in England and Scotland, whenever they may deem it proper, to authorize the principal coast-officer or comptroller, or other principal officer of customs, at any creek, harbour, or basin of Great Britain, to take the entries of goods imported in any vessel from Ireland, or intended to be laden on board any vessel bound to Ireland, so far as respects such produce of the United Kingdom, as is permitted to pass from one country to the other, without payment of duty.

Bonds.

By 48 Geo. III. c. 84. § 13. every bond which shall be entered into, in relation to the revenue or business of customs, shall continue in full force for two years, and may be prosecuted and put in suit at any time within two years from the time limited in the condition of every such bond for the performance thereof; and from the expiration of such two years, every bond upon which no prosecution shall have been commenced, shall be void, and may be cancelled and destroyed, as in 16 Geo. III. c. 48. is directed.

Counterfeiting Suffrances, &c.

By 23 Geo. III. c. 50. § 6. if any person shall counterfeit, raise, or falsify any sufferance, warrant, cocket, transire, letpass, certificate, permit, or any other custom-house warrant, document, or instrument, or any indorsement thereon, by this act required, he shall forfeit 200*l.* and such sufferance, &c. shall be void.

Seizures.

By 27 Geo. III. c. 32. § 15. in case any goods or commodities whatever, or any vessels, boats, horses, cattle, or carriages, shall be seized, as forfeited by virtue of any act relating to the revenue of customs, it shall be lawful for the commissioners of customs in England or Scotland, on evidence given to their satisfaction that the forfeiture arose without any intencion of fraud in the proprietor of such goods, &c. to order the same to be restored to such proprietor, in such manner, and on such conditions, as under the circumstances of the case shall appear to the commissioners reasonable, and as they shall think fit to direct; and if the proprietor shall comply with the terms prescribed by the commissioners, it shall not be lawful for the officer who shall seize such goods, &c. or any other person on his behalf, to proceed for the condemnation thereof: but if the proprietor shall not comply with the terms prescribed, such officer shall proceed for the condemnation, as if this law had not been made: ~~provided~~, that if the proprietor shall accept the conditions prescribed by the commissioners, he shall not have or be entitled to any damage on account of the seizure, or maintain any action for the same.

Penalties and Forfeitures.

By 49 Geo. III. c. 65. § 1. it shall be lawful for any two or more justices of peace for any county, riding, division, city, or liberty, wherein the offence shall arise, or wherein the offender shall be found; to examine into, hear, and determine all prosecutions for penalties incurred by any offence against this or any act now in force, or hereafter to be made, relating to the revenue of customs; and the said justices, upon information exhibited before them, for the recovery of any such penalty, shall summon the party accused, and, upon his appearance or default, proceed to the examination of the matter of fact, and upon due proof thereof, either upon the voluntary confession of the party, or upon the oath of one or more credible witnesses, to convict the offender in the said penalty: and in case of non-payment thereof, the said justice shall cause the same, by warrant of distress and sale under their hands and seals, to be levied upon the goods and chattels of the offender, and in default of sufficient distress, to commit the offender to any gaol in the county wherein the offence shall have arisen, or wherein the offender shall have been found, there to remain for six months, or until the penalty shall be paid.

In all proceedings before any justice of peace for any fine, penalty, or forfeiture, incurred under any act now in force, or here-

after to be made, relating to the revenue of customs, the leaving a summons at the house or usual place of residence of the party, and directed to such party by his right or assumed name, shall be (except where particular provisions are or shall be made for summoning offenders, or for condemning seizures made from persons unknown) deemed to be as good and sufficient a summons, and as legal and effectual a notice, as if personally served upon such party, and as if directed to him by his proper name. § 3.

Where any party shall be convicted before any two or more justices of peace, in any penalty incurred by any offence against any act relating to the revenue of customs, wherein no power of mitigation shall be given, or where it shall be given not specifically by the same act, but only by reference to some other law, it shall be lawful for the justices, in cases where they shall deem it expedient, to mitigate the penalty, so as the sum to be paid by the party be not less than one half of the amount of the penalty in which he shall have been convicted. § 4.

Where any such offender shall be committed to gaol for default of distress, and shall there remain until the expiration of the period for which he shall have been committed, he shall be wholly discharged from the payment of the penalty. § 5.

No information or proceeding for any fine, penalty, or forfeiture incurred by any offence against any act now in force, or hereafter to be made, relating to the revenue of customs, shall be exhibited before any justice of peace, after the expiration of six months from the time of committing the offence. § 6.

By 56 Geo. III. c. 104. § 14. it shall be lawful for any two or more justices of peace, for any county, city, riding, division, or liberty, to examine into, hear, and determine all prosecutions for the condemnation of any seizure made by virtue of any act relating to the revenue of customs; and the said justices, upon information exhibited before them, for the condemnation of any such seizure, shall proceed thereon in the same manner, and with the like powers as are given to them by any law of excise.

Ships' Registry.

By 4 Geo. IV. c. 41. all the former laws relative to the registering of British vessels are repealed; and by section 2. no vessel of 15 tons or upwards shall be entitled to the privileges of a British-built ship, unless the owner or owners shall have obtained a certificate of its registry from persons authorized to grant it.

But no vessel under thirty tons, and solely engaged in the fishery on the banks of Newfoundland, or the parts adjacent, or on the banks or shores of Quebec, Nova Scotia, or New Brunswick, &c. shall be, while so employed, required to be registered.

Any ship or vessel, not being duly registered according to the provisions of this act, and exercising the privileges of a British ship, is, with all guns, furniture, ammunition, &c. liable to be forfeited to any of his majesty's officers of customs. § 4.

No ship is entitled to be registered, except it be British-built, or except it be built in the Isle of Man, or the Islands of Guernsey or Jersey, or in the British colonies or plantations in Asia, Africa, or

America, or of Malta, Gibraltar, or Heligoland, or except they are prizes, or have been condemned for carrying on the slave trade. § 6.

And no ship or vessel is to enjoy the privileges of a British ship, after she shall have been repaired in a foreign country, if such repairs exceed twenty shillings a ton, unless such repairs have been necessary by extraordinary damage, and to enable such ship to perform her voyage, or to return home. § 6.

British ships declared to be unseaworthy, or being stranded, shall be incapable of being recovered or repaired, are disentitled to the privileges of a British-built ship for any purposes of trade or navigation; and British ships captured, or sold to foreigners, are not to be again entitled to registry. § 7, 8.

Ships are to be registered at the port to which they belong; but the commissioners of his majesty's customs may, if they shall see fit, permit the registry at other ports; and the port to which a vessel is deemed to belong, shall be the nearest port to the residence of some or one of the owners thereof; and where any owner shall have sold his share, the vessel must be registered *de novo*. § 10.

No person who has taken the oath of allegiance to any foreign state, unless he afterwards become a denizen, or naturalized subject, can be entitled to be the owner of any ship or vessel authorized to be registered by virtue of this act. § 11.

By the 22d section, the name of the vessel must be painted on the stern, and after registry must not be altered.

Persons applying for a certificate of the registry of any ship or vessel, must produce the builder's certificate of the particulars of such ship, which must be verified on oath. § 23.

If the ship's registry should be lost, the commissioners of his majesty's customs are authorized to permit the registry *de novo*. § 24.

Persons wilfully detaining the certificate of ship's registry, are subject to the penalty of 100*l.*; and if persons detaining the certificate abscond, the commissioners of the customs are authorized to grant a fresh certificate. § 25.

Vessels condemned as prizes, or for breach of the laws against the slave trade, shall, upon such vessels being registered, have the certificate of condemnation produced. § 27.

Prize vessels belonging to any of his majesty's subjects residing in the islands of Guernsey or Jersey, must be registered at the ports of Southampton, Weymouth, Exeter, Plymouth, Falmouth, Liverpool, or Whitehaven. § 28.

Persons selling or transferring their interest in any ship or vessel, must transfer the same by bill of sale, or other instrument in writing, in which the certificate of registry must be recited. § 20.

The property in ships, where there is more than one owner, is to be divided into sixty-four parts or shares; and the oath upon the first registry is to state the number of shares held by each owner. § 30.

By the 31st section, only 32 persons can be owners at one time.

No bill of sale, or other instrument in writing, is valid to pass the property in any ship or vessel, until produced to the officers of the customs, and entered in the book of registry. § 35.

When a bill of sale has been entered as aforesaid, for the transfer

of any shares, thirty days is to be allowed for indorsing the certificate of registry, before any other bill of sale for the same shall be entered. § 37.

Bills of sale may be produced, after entry at other ports than those to which vessels belong; and if upon registry *de novo* of any vessel, any bill of sale shall not have been recorded, the same shall then be produced, and bills of sale, previous to registry, may be afterwards recorded. § 38, 39.

Upon change of property in any ship or vessel, registry *de novo* may be granted, if desired. § 40.

Copies of oaths, and extracts from books of registry, are admitted in evidence. § 41.

Vessels, or the shares of owners, sold in the absence of owners, without formal powers, the commissioners of customs may permit the record of such sales to be registered; and in other cases where bills of sale cannot be produced, the same power is granted, security being given to produce legal powers, or to abide future claims. § 42.

The transfer of any share or shares of vessels by way of mortgage, the mortgagee thereof is not to be deemed an owner, and in the transfers of ships for security of debts being duly registered, the rights of the mortgagee is not to be affected by any act of bankruptcy of the mortgagor. § 44.

Ship's Crews.

By 35 Geo. III c. 68. § 1. no goods whatever shall be imported into Great Britain, or the islands of Guernsey, Jersey, Alderney, Sark, or Man, on board any vessel registered, or which by law is required to be registered as a British vessel, unless such vessel shall be navigated by a master and three-fourths at least of the mariners British subjects.

No goods shall be exported, or shipped for exportation, from Great Britain, or the islands of Guernsey, Jersey, Alderney, Sark, or Man, on board any such vessel, unless she shall be navigated by a master and three-fourths of the mariners British subjects. § 2.

No vessel registered, or which by law is required to be registered as a British vessel, at any of the ports of Great Britain, Guernsey, Jersey, or the Isle of Man, or any of the colonies, plantations, islands, or territories belonging, or which may hereafter belong to his majesty, shall be navigated but by a master and three-fourths at least of the mariners British subjects, except as herein provided. § 3.

No goods shall be carried from any one port, member, or creek, or place of Great Britain, Guernsey, Jersey, Alderney, Sark, or Man, to any other port, member, creek, or place of the same, or any of them, in any such vessel; nor shall any such vessel be permitted to sail in ballast from one of the said ports or creeks to another; nor shall any British vessel be permitted to sail from the ports or coasts of this kingdom, or of Guernsey, Jersey, Alderney, Sark, or Man, to be employed in fishing on the said coasts, unless such vessels shall be wholly manned with and navigated by a master and mariners all British subjects. But it shall be lawful for

the commissioners of customs in England and Scotland respectively, by licence, for which no fee shall be taken, to authorize any vessel employed in fishing on the coasts of Great Britain, Guernsey, Jersey, Alderney, Sark, or Man, to have on board any foreign mariners for instructing the British mariners in the art of fishing, or taking or curing fish; such foreign mariners not exceeding one-fourth of the number of mariners on board. § 4.

By 53 Geo. III. c. 47. to enable owners of vessels to employ persons fully competent to the duty of mates, although under twenty-one years of age, who cannot now be employed on board British vessels; it shall be lawful for the collector or principal officer of customs in any port of Great Britain to take such bonds as have heretofore been given by mates of British merchant vessels, from any person appointed to serve as mate on board any British merchant vessel, who shall have attained the age of eighteen years.

By 34 Geo. III. c. 68. § 7. every foreign sailor or mariner, who shall serve on board any of his majesty's ships of war, in time of war, for three years, either in the same or in different vessels, and who shall have obtained certificates from the commanders of such vessels on board which he shall have served, testifying that he has so served, and his faithful service and good behaviour, and who shall have taken the oath of allegiance before some justice or principal magistrate of some city or town in his majesty's dominions, or before the principal officer of customs in any port of such dominions, and who shall obtain a certificate thereof, shall be entitled to be employed as a master of a British vessel, or as a British sailor.

No person qualified to be the master of a British vessel, or to be a British sailor, seaman, or mariner, by birth, naturalization, denization, conquest, or service, and who has taken an oath of allegiance to any foreign sovereign or state (except under the terms of some capitulation upon the conquest of any of the dominions of his majesty, and for obtaining the benefit of such capitulation only), shall be qualified to be master of a British vessel, or a British sailor, unless such person have taken such oath of allegiance before he became so qualified; and any person who shall, after having become disqualified by taking such oath of allegiance, take the charge of any British vessel as master thereof, shall forfeit 100*l.*; or, after being so disqualified, shall engage as a British sailor, shall forfeit 10*l.* But no vessel, on board whereof any person so disqualified shall be employed as master shall be forfeited by reason thereof, if the owner shall shew that such disqualification was unknown to him or his agent; and that the disqualification of such sailor was unknown to such owner or his agent, and to the master, at the time of engaging him. § 8.

In the navigation on the seas of America and the West Indies, from any port of America and the West Indies to any other port of America and the West Indies, any negroes belonging to persons being or having become his majesty's subjects in manner aforesaid, and with the qualifications aforesaid; and in the seas to the eastward of the Cape of Good Hope, from any port to the eastward of

the Cape of Good Hope, to any other port to the eastward thereof, Lascars, and other natives of any of the countries to the eastward of the Cape of Good Hope, may be employed as British sailors as heretofore practised. § 9.

If any goods shall be imported, exported, or carried coastwise, contrary to this act, such goods, and also the vessel in which the same shall be so imported, exported, or carried coastwise, shall be forfeited; and if any vessel shall sail in ballast, or to be employed in fishing on the coast as herein-mentioned, or being required to be manned and navigated with a master and a certain proportion of British mariners as herein-directed shall not be manned and navigated according to this act, such vessel, and all the goods on board, shall be forfeited. § 10.

By 34 Geo. III. c. 69. § 12. in case any British vessel shall be found at sea, having on board a greater number of foreign mariners than is allowed by this or any other law; and the master of such vessel shall produce a certificate of the necessity of engaging such foreign mariners, by occasion of the sickness, death, or desertion of the like number of British mariners, or of their being taken prisoners, and that British mariners could not be engaged at such foreign port to supply their room, and that for the safe navigation of the vessel it became necessary to engage such foreign mariners, under the hand of his majesty's consul at the foreign port where the said mariners were engaged (and if there be none such there, under the hands of two known British merchants at such port); it shall not be lawful for the persons authorized to make seizures of vessels navigated contrary to this act, to detain any such vessel, but such person shall indorse the certificate so produced, testifying the production, and when and where met with at sea, and that the number of foreign mariners corresponds with the certificate.

DRAWBACKS ON EXPORTATION.

Packing.

By 25 Geo. III. c. 74. § 12, 13. the exporter shall give twelve hours notice within the limits of the chief office of excise in London, and twenty-four hours notice in other places, of his intention to pack up, to be exported, any such commodities, and of the time and place when and where they are to be packed up, to the officer appointed for that purpose by the commissioners of excise; and if such packing is not begun within an hour after the time mentioned in the notice, it shall be void, and a fresh notice given.

Such officer shall attend to see such commodities packed up, and the same shall be packed up in the presence of such officer, and shall be secured with such fastenings, and sealed with such seal, in such manner as the commissioners of excise shall direct; and if any person shall open such package, or wilfully deface the seal (except the officer of excise at the port of exportation), he shall forfeit 20*l*. § 12.

Shipping.

By 25 Geo. III. c. 74. § 13. the exporter shall give six hours notice of the time and place of shipping the commodities, to the officer of excise of the place where they are to be shipped, who shall attend to see them put on board.

The officer attending the shipping may open and examine the commodities, that he may be satisfied they are the same with the account sent him by the officer in whose presence they were packed. § 14.

By 56 Geo. III. c. 104. § 25. every person intending to export goods, in respect of which any drawback of excise may be payable, shall give to the officer of excise of the port, a notice thereof in writing, six hours at least before such shipment shall be made; in which shall be specified the number of packages to be shipped, with their respective marks and numbers, and the quantity and quality of the goods in each package, and the rate and amount of duty paid thereon; and shall also specify the quay or place where such packages and goods are lying, and from which the goods are to be shipped, and the time of shipment, the name of the ship in which they are to be exported, of the master thereof, and of the port or place to which the goods are to be exported, and the place of the port in which such vessel shall then lie: and if any goods shall be shipped for exportation without such notice, or without such officer being allowed an opportunity of inspecting and examining the same, or if such person shall not, after the expiration of such six hours, or after the officer shall have finished his examination, with all diligence, and without unnecessary delay, ship the same, no drawback shall be paid thereon.

If, upon examination, any such goods or package shall be found to vary from the description contained in the notice, so that a higher or greater sum than of right due shall have been claimed, or would, in case such discovery had not been made, have been, on the exportation of such goods, deemed payable as drawback, or his majesty in any respect defrauded therein, such goods or packages, and the goods contained therein, shall be forfeited, and may be seized by any officer of excise; and the person who entered the same for exportation, knowing thereof, shall, above all other penalties, forfeit treble the value of such goods, including the duties of 100*l.* for each package, at the election of the commissioners of excise, to be signified by the information for the recovery thereof. § 26.

By 57 Geo. III. c. 87. § 10. no drawback of excise shall be paid upon any goods packed or shipped for exportation, which shall be of so bad and unmerchantable a quality, as not to be of the value of the duties of excise, chargeable, or sworn, or stated in the notice of shipping such goods required by 56 Geo. III. c. 104. to have been paid thereon, if sold for home consumption: and in such notice, as well the rate and amount of the duty paid on the goods therein mentioned, as of the drawback claimed on the

exportation thereof, and the value of such goods if sold for home consumption, shall be stated and made part of the description of such goods.

In every case where a notice of shipping any goods for exportation on drawback shall be given, it shall be lawful for any officer of excise to open any or all of the packages mentioned in such notice, and unpack and examine the contents; and the exporter shall, on the request of such officer, repack such goods (unless he choose to receive such goods unpacked), in the presence of a proper officer of excise, that the same may be secured and sealed, as by law is required, he being allowed by the commissioners of excise the reasonable expences of repacking, and shall forthwith ship the same under the former notice, or give a fresh notice, as the occasion may require. § 11.

If, upon notice given for shipping any goods for exportation upon drawback, any other goods or packages than such as are described in such notice shall be shipped for them, or if any packages or goods described in such notice, shall, after the shipment, be re-landed in Great Britain (shipwreck and other unavoidable accident excepted), without payment of the duty imposed upon the importation of goods of the like kind, such goods, with the packages, with the ship or boat from which the same shall be unshipped, shall be forfeited, and may be seized by any officer of excise; and the person so offending or assisting therein shall forfeit 200*l*. or treble the value of such goods, at the election of his Majesty's attorney-general, or the person who shall prosecute: and such penalty shall be in addition to the penalty of the bond given on the shipment of the goods, and besides all other forfeitures and penalties. § 12.

Bond for the due Exportation.

By 25 Geo. III. c. 74. § 13. the exporter shall, before shipping the commodities, give sufficient security, to be approved of by the commissioners of excise, or the person by them appointed for that purpose, in treble the value of the duty to be drawn back, that they shall be shipped and exported, and shall not be unshipped, unladen, or laid on land, or put on board any other ship in Great Britain, (shipwreck or unavoidable accident excepted); which security the officer of excise at the port of exportation is to take; and the exporter, or his clerk or manager, shall make oath or affirmation (to be administered by the surveyor or supervisor, or other officer appointed by the commissioners for that purpose), that he believes the duties on such commodities had been paid, and that they are the same described in the account sent by the officer in whose presence they were packed, to the officer attending the shipping.

By 5 Geo. I. c. 11. § 5. no bond given for the exportation of coffee, tea, or other certificate goods to Ireland, shall be delivered up, or any drawback allowed for any goods entitled thereto, until a certificate be produced, from the collector, comptroller, and sur-

veyor of customs, or any two of them, of the port in Ireland where the goods shall be landed, testifying the landing thereof; and the condition of such bond shall be to produce such certificate in six months. And if no such certificate shall be produced within the said time, the commissioners of customs may put the bond in suit.

Debenture, and Payment of Drawback.

By 25 Geo. III. c. 74. § 13. the exporter or his clerk shall make oath or affirmation (to be administered by the surveyor or supervisor or other officer appointed by the commissioners for that purpose), that he believes the duties upon such commodities have been paid, and that they are the same described in the account sent by the officer in whose presence they were packed to the officer attending the shipping; and the said surveyor or supervisor, or other officer, and the officer who attended the shipping, being satisfied of the truth thereof, shall, within a month after the exportation, give to the exporter, or his clerk, or manager, a debenture, expressing the quantities and kinds of the commodities shipped, that the duties have been paid for the same, and security given for the due exportation thereof.

Such debenture being produced to the collector of the port where the commodities were exported, he shall forthwith pay the exporter or his agent the duties before paid for the commodities so exported, or such part thereof as is allowed by law; and if such collector shall not have money in his hands to pay the same, the commissioners of excise shall pay such drawback out of such duties as drawbacks granted upon the exportation of the same commodities are now payable by law. § 13.

By 26 Geo. III. c. 40. § 18. no entry shall pass, nor any debenture be made out, upon the exportation of goods entitled to drawback or bounty, but in the name of the real owner, if resident in Great Britain, who, before he receives such drawback, shall, upon the debenture, verify by oath that he is the real owner, and that the goods are really and *bonâ fide* exported to foreign parts, and have not been re-landed in Great Britain; but if he shall not have a property in the drawback, he shall, at the time such goods are entered for exportation, acknowledge under his hand upon the entry the person who is entitled thereto; and such person shall, after the requisites of this act are complied with, receive the drawback, and his receipt upon the debenture shall be a discharge for it.

Nothing in this act shall extend to prevent the agent of any corporation or company from making oath as now by law allowed, to entitle them to obtain a drawback on the exportation of goods; nor to prevent any proprietor of lands in any of his Majesty's colonies or plantations, nor any person whatever, from exporting goods from any place other than at which he resides, if he shall reside at a greater distance than twenty miles therefrom; nor any person from exporting from any place, other than that at which he

resides, any goods of British manufacture (being his own property), by and in the name of an agent, who is hereby authorized to perform every act to entitle the real proprietor to the bounty or drawback, and to recover the same, as he might do; provided such agent shall testify upon oath, on the back of the debenture, besides what is already required to be testified, the name of the real proprietor of the goods, and his place of abode, and shall, if required by the officer, give sufficient reason for his knowledge of the place to which the goods are to be exported. § 18.

No bounty shall be paid for any goods exported to Ireland, and no drawback or bounty shall be paid for any goods exported to Guernsey, or Jersey, or the Isle of Man, nor any debenture made out for the same, until a certificate shall be produced from the collector, comptroller, and surveyor of customs, or any two of them, in Ireland, or from the register of certificates, or other chief officer of customs, in Guernsey or Jersey, at the place of importation, certifying that the goods have been duly landed there. § 19.

By the 5 Geo. IV. c. 48. § 9. all drawbacks and allowances whatever on the re-exportation from Ireland to Great Britain, and from Great Britain to Ireland respectively, of any articles, the growth, produce, or manufacture of either country, which shall have been imported into either country from the other, and on the importation of which no duty shall be payable in either country at the time of such re-exportation, shall cease and determine.

By 41 Geo. III. c. 81. § 7. in every case where it shall be made appear to the satisfaction of the commissioners of excise, that any excisable goods, in respect whereof any bounty or drawback is given, and which were fairly and regularly exported for Ireland, Guernsey, or Jersey, have been lost, by being taken by enemies, or perishing in the seas, (the examination and proof thereof being left to the judgment of the said commissioners), it shall be lawful for them to order the debenture to be made out, or to pay the bounty or drawback for the goods so lost.

By 25 Geo. III. c. 74. § 15. if, after the shipping any such commodities, and the giving or tendering such security, in order to obtain a drawback, the same or any part thereof shall be unshipped, unladed, or laid on land, or put into any other ship within Great Britain (shipwreck or unavoidable accident excepted), then, over and above the penalty of the bond, all the commodities which shall be so unshipped, &c. or the value thereof shall be forfeited, and may be seized by any officer of customs or excise.

By 43 Geo. III. c. 132. § 28. where any goods shipped in order to be exported to foreign parts are liable to forfeiture on account of being unshipped or re-landed, the ship or vessel out of which such goods may be so unshipped or re-landed shall be liable to forfeiture, and may be seized by any officer of customs, or of excise, in cases where that revenue is concerned; provided that in any case in which it shall be proved to the satisfaction of the commissioners of customs in England or Scotland respectively, or of the excise, that such goods so unshipped or re-landed did not form a part of the cargo of

the said ship or vessel, or were of small value, and that from the nature and quantity thereof, and the circumstances attending the unshipping or re-landing, the same was done without the privity of the master of such ship or vessel, it shall be lawful for the said commissioners to remit such forfeiture, and declare the seizure of such ship or vessel null and void.

WAREHOUSING ACT.

By 4 Geo. IV. c. 24. it is lawful for the importer, proprietor, or consignee of any goods or merchandize whatsoever, which shall be legally imported into the United Kingdom of Great Britain and Ireland, to lodge and deposit or secure such goods and merchandize in warehouses or other approved places, without payment of any duty, either of customs or excise, at the time of the first entry of any such goods or merchandize (except as hereinafter excepted); and it is lawful for the importer, proprietor, or consignee of any goods or merchandize whatever, and of what nature and kind soever (tea only excepted), imported from any port or place whatever (the dominions of the Emperor of China excepted), in any British-built ship or vessel, or in any ship or vessel which by law is or may be entitled to the privileges of a British-built ship or vessel, of the tonnage required by law for the importation of goods allowed to be imported, in like manner to lodge and deposit, or secure such goods and merchandize in warehouses or other approved places (but for the purpose of exportation only), without payment of any duty, either of customs or excise, at the time of the first entry of such goods or merchandize (except as hereinafter excepted), although the importation of such goods or merchandize may be in any way prohibited or restrained by any act or acts in force immediately before the commencement of this act; and it is lawful for the importer, proprietor, or consignee of any goods and merchandize whatever, and of what nature and kind soever (tea only excepted), imported from any country, port, or place not being in the possession of or belonging to the crown of the United Kingdom of Great Britain and Ireland (the dominions of the Emperor of China excepted), in any foreign ship or vessel (of the tonnage required by law for the importation of goods permitted to be imported), in like manner to lodge and deposit or secure such goods and merchandize in warehouses or other approved places (but for the purpose of exportation only), without payment of any duty of customs or excise at the time of the first entry of such goods and merchandize (except as hereinafter excepted), although the importation of such goods or merchandize may in any way be prohibited or restrained by any act or acts in force immediately before the commencement of this act; subject, nevertheless, to the several rules, regulations, conditions, and securities hereinafter contained, as well with respect to the ports as to the warehouses and places in which such goods and merchandize may be lodged and secured, and subject also to the several limitations and exceptions hereinafter specially provided and contained. § 3.

And any goods or merchandizes allowed to be warehoused may be imported for the purposes of this act, although the importation may be prohibited by any act in force before its commencement; except any gunpowder, arms, ammunition, or utensils of war, contrary to the 1 Jac. II. c. 8. and except any dried or salted fish (except stock fish), or any beef, pork, or bacon, or any infected hides, skins, horns, hoofs, or of any other part of any cattle or beast, or any counterfeit coin, or any books first composed or written, or printed and published in the United Kingdom, and reprinted in any other country or place, or any copies of prints first engraved, etched, drawn, or designed in the said United Kingdom, or any copies or casts of sculptures or models, contrary to the several acts in force for the prohibiting or restraining the importation of the said articles. § 4.

The treasury is empowered to select ports and warehouses for warehousing goods in general, or any goods in particular. § 5.

Prohibited goods allowed to be warehoused for exportation only, are to be lodged separately, in warehouses specially secured. § 6.

All goods enumerated in schedule (A) are to be deposited in like secure warehouses. § 7.

Spirits, wines, cocoa-nuts, coffee, and pepper, are to be deposited in warehouses and places duly approved of by the treasury. § 8.

The treasury may revoke or alter warrants as to ports or goods. § 9.

And any importer, consignee, or proprietor of any goods allowed to be warehoused, may lodge any such goods in warehouses erected in places inclosed by or surrounded with walls, or in any other warehouse or place of special security, approved of by the commissioners of the treasury, although such goods may not be specified in any warrant of the said commissioners, unless the said commissioners shall specially prohibit the warehousing of any such goods. § 10.

No goods or merchandize whatsoever, which have been prohibited to be imported, and which under this act are permitted to be imported and warehoused for exportation only, nor any goods which shall be imported into Great Britain contrary to the laws of navigation, shall be delivered from or taken out of any such warehouse for the purpose of being used or consumed in any part of the United Kingdom, upon any pretence or under any authority whatsoever; upon pain of forfeiture of all such goods, and twice their value. § 11.

No goods or merchandize, the importation whereof for home consumption hath been prohibited, and which shall be imported and warehoused or secured under the provisions of this act for exportation, (goods of the manufacture of Persia, China, or the East Indies excepted), shall be delivered from or taken out of any such warehouse or place, for the purpose of being exported to any British colony, plantation, territory, or dominion in America or the West Indies, upon pain of the forfeiture of all such goods and merchandize, and also a sum equal to twice the value of such goods and merchandize. § 12.

The several goods mentioned in schedule (B), which shall be warehoused, shall not be delivered from any warehouse for the pur-

pose of being exported to any British colony, plantation, territory, or dominion in America or the West Indies, nor be permitted or allowed to be imported into any such British colony or plantation, unless all duties, payable in Great Britain or Ireland respectively, shall have been first paid ; upon pain of forfeiture of all such goods, and twice their value. § 13.

All goods not directed to be warehoused or secured under the order of the commissioners of the treasury, or not specified in the schedule marked (A), or the importation of which hath not been prohibited by any act in force immediately before the passing of this act, may be lodged in such warehouses or places in the port of London, or in any other port in the United Kingdom, as the commissioners of customs; and the commissioners of excise, shall approve. § 14.

But bond must be given for the due payment of the duties on goods lodged in such warehouses or places aforesaid. § 15.

No foreign brandy, rum, geneva, spirits, aqua vitæ, or wine, shall be warehoused, unless imported in casks, each containing at least forty-five gallons, or in bottles, in cases containing at least three dozen quart bottles, or bottles larger than quart bottles ; and no tobacco or snuff, unless imported in casks, hogsheads, chests, cases, or packages, containing at least four hundred and fifty pounds avoirdupois net weight each, without and free from any internal packages separate and separately of less weight ; and no coffee or cocoa-nuts, unless in casks, bags, boxes, or other packages, containing at least 100 lb. avoirdupois net weight each. § 16.

Rum, the produce of the British plantations, imported directly from thence in casks containing at least thirty-five gallons each, and intended to be used and disposed of solely as stores of ships and vessels, may be lodged or secured in any warehouse. § 17.

The master or owners of any British ship or vessel may cause the surplus stores of any such ship to be lodged and deposited in such warehouse, and to take such surplus for the use of such ship on the departure thereof on any foreign voyage, or whenever the same shall be required by the owners, for the use of any such ship or of any other ship belonging to the same owners, or for the private use and consumption of the importer, on payment of the duty ; provided, that if such stores shall not be taken out within one year, they shall be disposed of in the same manner as goods, wares, and merchandize are directed to be disposed of, after the expiration of three years. § 18.

Goods or articles, the growth or produce of any of the territories or dominions of Portugal, may be received and warehoused in the port of London. § 19.

Before any goods subject to any duty of excise shall be unshipped for the purpose of being warehoused, the importer or proprietor shall make entry thereof in writing, specifying the name of the ship, the master, the number and marks of the casks, cases, bags, boxes, or other packages, the kind of goods contained in each, and at what port the same was laden. § 21.

And before any goods subject to any duty of excise shall be allowed to be warehoused, security shall be given, in double the

value of the duties, for payment of the said duties, or in case the same shall not be taken or delivered out for home consumption or for exportation within three years from and after the day of the date of the bond to be given, then to pay all the duties together with all charges that may be incurred by the officers; but no bond or bonds is required for any tobacco or snuff, upon the first entry and warehousing thereof, and the bond to be given upon the exportation of tobacco or snuff shall not be charged with any stamp duty. § 22.

A warrant from the collector of excise must be obtained before landing or warehousing. But officers of the East-India or West-India Docks, &c. may order goods to be warehoused in those docks. § 23.

The officers of excise may take account of goods before they are warehoused: provided, that where goods or merchandize shall be on board of any ship or vessel which shall be lying in any dock surrounded by walls, the account shall not be taken until the said goods shall have been landed, except in cases where suspicion shall arise that any part has been clandestinely conveyed away, and applied to home consumption. And officers of excise shall be permitted to take samples, that is to say, out of every cask of spirits, a sample not exceeding half a pint, and out of every cask or other package of coffee or cocoa-nuts, a sample not exceeding one ounce. § 24.

Goods are to be stowed so as to afford access to packages, &c. under the penalty of five pounds. § 25.

And no goods or merchandize shall be delivered out of any bonded warehouse, but upon the following conditions; (that is to say)—If for exportation, or from any part of the United Kingdom to Guernsey, Jersey, Alderney, or Sark, or from Great Britain to Ireland, or from Ireland to Great Britain, or from Great Britain or Ireland to the Isle of Man, the proprietor or exporter may take the same without payment of any duty, (except in cases hereinafter mentioned), provided, they shall make a due entry thereof, and shall enter into bond, in double the value thereof, with condition that the said goods shall be landed at some foreign port or place, or in Guernsey, Jersey, Alderney, or Sark, and that no part of the same shall be relanded in Great Britain or Ireland, nor landed in the island of Faro or Ferro; and such bond may be discharged as follows: For such goods as shall, on exportation from Great Britain to Ireland, or from Ireland to England, or from any part of the United Kingdom to the Isle of Man, Guernsey, Jersey, Alderney, or Sark, or any part of foreign Europe not within the Straits of Gibraltar, the condition of the bond shall be to bring a certificate in discharge thereof within six months; and for such as shall be landed at Gibraltar, or any foreign parts within the Straits of Gibraltar, within twelve months; and for such as shall be landed in any part of Africa not within the Straits of Gibraltar, and on this side the Cape of Good Hope, or any part of America, within eighteen months; and for such as shall be landed at St. Helena, or in any port or place at or beyond the Cape of Good Hope, within thirty months: and such certificate, where any officer of his Majesty's customs shall be resident, shall be signed by such officer; and for want of such, by the governor of such islands, &c. or in

his absence by the deputy-governor; and for goods landed at any foreign port, by the British consul or vice-consul, and if there be no consul or vice-consul, then under the hand and common seal of the chief magistrate; or if there be no chief magistrate, then under the hands and seals of two known British merchants; and such bond may also be discharged, upon proof made that such goods were taken by enemies, or perished in the seas. And in all cases where any goods which shall have been legally imported, and which may be legally used and consumed in the United Kingdom, shall be intended to be taken to be consumed in Great Britain or Ireland, the person shall first pay the full duties of customs or excise. Every bond entered into as aforesaid shall continue in force, and may be prosecuted at any time within thirty months; and the exportation to Guernsey, Jersey, Alderney, or Sark, or the Isle of Man, shall be made on board of British ships only, registered and navigated according to law. § 27.

No bond is required to be given or entered into with the officer of the customs, for any goods liable to duties of excise. § 28.

Exciseable goods for home consumption are to be accompanied by permits; and in case the same shall be altered in quantity or quality after being delivered out of the warehouses, and before the same shall be exported, or if the whole or any part shall, after being shipped, be unshipped, or put into any other ship or vessel, or into any boat (shipwreck or other unavoidable accident excepted) or shall be reloaded in Great Britain or Ireland, all such goods shall, together with the packages containing the same, be forfeited, over and above the penalty of the bond. § 29.

No goods, the duties on which shall have been secured by bond, and which shall have been imported in bulk, shall be delivered, except in the whole quantity for which such bond shall have been given, or a quantity not less than one ton weight, unless by special leave; and before any merchandize shall be delivered out of the warehouse, every package shall be marked in such distinguishing manner as the commissioners of customs or excise shall direct. § 30.

Prohibited goods exported from warehouses are liable to all laws in force against them, and also to all such regulations as may be made by the lords of the treasury. § 31.

No goods to be exported in vessels under 70 tons, except what may be exported by licence to the Isle of Man. § 32.

No goods must be taken out of warehouses, except in their original packages, &c. except as hereinafter provided: nor shall any brandy, geneva, spirits, aqua vitæ, or wine, be so taken out for exportation in any less quantity than one entire cask (rum for stores excepted, as hereinbefore provided), containing at least forty-five gallons, or in cases containing at least three dozen bottles, not less than repacked quart bottles. § 33.

Importers and proprietors of goods may examine, sort, separate, and repack goods, in the presence of the officers, upon giving twelve hours notice. § 34.

Goods which have been shipped for exportation, if reloaded, except by necessity or distress, are subject to forfeiture. § 35.

Vessels also, out of which goods entered for exportation have been relanded, are also subject to forfeiture; except it can be proved, to the satisfaction of the commissioners of the customs or of the excise, that such goods or merchandize so unshipped or relanded, either did not form any part of the cargo of the ship or vessel, or were of small value, and that from the nature and quantity, and the circumstances attending the unshipping, the same was done without the privity or knowledge of the master. § 36.

Twenty-four hours notice is to be given of taking goods out of warehouse liable to excise duties, and such is to express whether to be taken out for home consumption or for exportation. § 37.

No goods subject to a duty of excise shall be taken or delivered out, either for home consumption or exportation, save and except in the presence of the proper officer of excise. § 38.

And it is further enacted, that no goods whatever which shall have been secured in warehouses, nor any goods which are prohibited to be imported, and shall have been carried and put into any warehouses according to this act, shall be carried or put on board any ship, by lighter, boat, or craft, for exportation by any person whatever (except the proper officers of the revenue), other than such as shall be authorized by the commissioners of the customs; which said persons shall, upon conveying any goods on board any ship, give clear and full information thereof in writing to the master; which licence shall not be withdrawn, unless either the person or some other person employed by him, and with his privity or consent, shall commit some act against any law now made or hereafter to be made to secure the revenue of customs or excise. § 39.

The commissioners of customs are required to grant such licence to every person and persons who is or are now or may be by law entitled to carry or put on board such goods. § 40.

And if any goods entitled to drawback, bounty, or premium, or any goods which shall have been secured in warehouses without payment of duty, or any goods which are prohibited to be used or worn in any part of the United Kingdom, and which shall have been carried and put into warehouses, shall be carried on board any ship or vessel, by lighter, boat, or craft, for exportation to foreign parts, by any person or persons (except the proper officers of the revenue), other than such person as shall have been so licensed, then the drawback, bounty, or premium shall be forfeited, and the exporter, shipper, and every person who shall carry to or put on board any ship bound to foreign parts, shall severally forfeit for every such offence the sum of one hundred pounds. § 41.

Goods delivered for removal in the river Thames shall not be put on board any lighter or other vessel, unless the same shall have hatches secured by proper fastenings, on pain of forfeiture of the goods; and persons removing lighters having such goods on board, before the hatches are properly fastened, or altering fastenings, or removing, concealing, &c. any goods, shall forfeit 200*l*. § 42.

Goods secured in warehouse may be removed from one port to another, for the purposes of exportation, &c. on the following con-

ditions :—The importer, proprietor, or consignee, shall give at least twelve hours notice in writing to the warehouse keeper, of his intention, specifying the particular goods, the number, marks, and descriptions of each package, and the kind and species of goods, and (except in the case of crushed or refined sugars) in what ship imported, and by whom entered inwards, together with the date of such importation ; and if such goods or any part thereof, when delivered out of any warehouse (other than such warehouses as are or shall be surrounded by walls or other places of special security), shall be deficient of the actual weight or quantity ascertained and taken account of at the time of the importation beyond the amount of deficiency directed to be allowed in respect of the natural decrease of such goods, then such importer, proprietor, or consignee shall pay the full duties upon such deficiency beyond the amount so allowed. § 43.

The contents shall be marked or cut on each package intended to be removed, in all cases where the same shall be practicable ; and the importer, proprietor, or consignee shall make a due entry of the goods, wares, or merchandize with the proper officer of customs, and also of the excise, specifying in such entry the name of the ship or vessel in which imported (except as aforesaid), and the master thereof, when entered inwards, and by whom, and the date of the importation, also the number and marks of the packages, the kind or species of goods, wares, or merchandize, together with the weight or quantity contained in each, and in case of spirits, the strength thereof, and to what port the same is intended to be removed for the purpose of being exported. § 44.

If goods be not immediately shipped for exportation after such removal, they may be warehoused at the port removed to ; provided an entry be made for that purpose, and the duties on any deficiency be thereon paid ; but if the proprietor shall neglect to make such entry, and pay the duties on such deficiency, the commissioners of the customs and excise may cause all such goods, which shall not be shipped for exportation, to be disposed of in the same manner as goods are directed to be disposed of by this act, after the expiration of three years after the same shall have been first entered for the purpose of being warehoused. § 46.

In case any goods subject to duties of customs only, which shall be removed from port to port, shall not be well and truly delivered, without alteration or diminution, into the custody and possession of the collector and comptroller of the customs at the port in the United Kingdom to which the same were intended or bonded to be removed within three calendar months, except in cases of unavoidable necessity, such goods shall be forfeited, and may be seized by any officer or officers of customs or excise ; and the owner, proprietor or other person, at whose instance such goods shall be removed, or to whose hands the same or any part thereof shall knowingly come, and every person who shall knowingly harbour, keep, or conceal any such goods, or shall knowingly permit or suffer any such to be harboured or concealed, shall forfeit treble the value. § 47.

Previous to the removal of exciseable goods from port to port, a bond is to be entered into for the due delivery of such goods. § 48.

And, on the arrival of such exciseable goods at the port intended, entry must be made thereof with the proper officer of excise; and, if the goods are removed for exportation, the place to which the same are intended to be exported must be described, and the name of the ship or vessel; and the exporter shall enter into bond in treble the value of the goods, for the due exportation thereof, and for producing to the collector, supervisor, or other proper officer of excise, a certificate containing the several matters and things prescribed and required. § 49.

And if such exciseable goods are not shipped for exportation, they may be again warehoused; provided, over and besides the entry and bond required by this act, an entry be also made for that purpose with the collector or proper officer of excise, and bond be also given in double the amount of the duties on the importation of such goods, with condition that the said goods shall either be duly exported, or that the full duties of excise payable on the importation thereof shall be paid, within such period of time as was allowed for that purpose at the port where the same were first entered and warehoused, unless the same shall be sold by order of the commissioners of excise after the expiration of such period. § 50.

Goods may be removed a second time to any port where such goods are allowed to be warehoused upon like conditions. § 51.

On removal from port to port, goods shall be warehoused only for remainder of three years then unexpired from the date of the bond given on the first importation. § 52.

Goods may be removed from one bonding warehouse to another in the same port; provided that permission shall have been previously obtained. § 53.

Any person may export from Great Britain to the port of Douglas, in the Isle of Man, in British-built ships, owned, navigated, and registered according to law, and not of less burden than fifty tons, any quantity of wine, brandy, geneva, rum, tea, coffee, or tobacco, which any such person may be authorized so to export by virtue of any licence; and any such goods intended to be exported to the said port may be taken out of any warehouse or warehouses where the same may have been lodged, without payment of any duty of customs or excise. § 55.

The proprietors or consignees of any wine or rum may draw off any such into reputed quart bottles, and pack the same in cases containing not less than three dozen each, for the purpose of being exported from warehouses. § 56.

Rum in warehouse may be shipped as ship's stores without payment of duty. § 57.

The importer or proprietor of any wine may mix, once, such quantity of foreign brandy which shall have been lodged in any warehouse in the same port, as shall be deemed necessary to preserve or improve such wine, not exceeding the proportion of ten gallons of brandy for every hundred gallons of wine. § 58.

Importers of foreign spirits warehoused may fill up casks from any other; and fresh samples may be taken: provided, that no casks of spirits warehoused under bond, shall be filled up more than once, except at the time of the exportation thereof. § 59.

Wine bonded may be sent to the East or West Indies, in order to improve its flavour, on the proprietor's giving notice, and entering into bond for the due performance of all the stipulations. § 60.

By section 61, goods not taken out of warehouse within three years are to be sold for payment of duties and other charges. § 61.

The lords of the treasury may permit goods to remain warehoused for any further time beyond three years. § 62.

And whenever the proprietor or consignee shall make a representation to the commissioners of customs or excise, that any goods have been damaged or spoiled, it shall be lawful for the commissioners of customs or excise to order such goods to be destroyed, and rendered wholly useless. § 63.

And if the quantity of any goods or merchandize subject to any duty of customs or excise, both or either, which at the full end and expiration of three years from date of any bond, shall have been duly delivered out of any warehouse or place in which the same shall have been lodged or secured under this act for home consumption, added to the quantity of such goods which within the like period shall have been duly exported, with such allowance thereon as herein-after mentioned, shall fall short of the actual quantity ascertained and taken account of at the time of the importation thereof, then the importer or proprietor shall pay the whole of the duties in respect of the proportion of such goods deficient in the quantity so taken out for home consumption; and upon such payment, the bond shall be delivered up and cancelled: provided that nothing shall be construed to extend to charge any such goods which shall have been lodged or secured in warehouses surrounded by walls, or in other places of special security, in respect of any deficiency, except in cases of suspicion of fraud. § 64.

But no duty either of customs or excise shall be demanded from any importer, consignee, or proprietor, which shall have been lodged or secured in warehouses erected in places inclosed or surrounded with walls, or in any other warehouses or places of special security, appointed by the commissioners of the treasury, and which shall be taken out of or from any such warehouse or place for exportation, on account of any increase or decrease, in quantity or quality, excepting where suspicion shall arise that any part has been clandestinely conveyed away and applied to home consumption; and such goods and merchandize (except wine and spirits) shall not be again weighed, gauged, or measured at the time of taking out the same for exportation, excepting in cases where such suspicion shall arise; and upon all goods which shall be taken out of such warehouses to be used or consumed in any part of the United Kingdom, the duties of customs and excise shall be paid according to account taken thereof at the first examination. § 65.

And whenever any entry shall be made for the purpose of export-

ing to foreign parts, or Guernsey, Jersey, Alderney, or Sark, any spirits, wine, coffee, cocoa nuts, or pepper, which shall have been warehoused in any warehouse or place (save and except such warehouses as are or shall be surrounded by walls, and such as are or shall be specially approved of by the commissioners of the treasury); if the wine in any cask shall be found, at the time when the same is delivered for the purpose of being exported, to be from natural waste decreased and less in quantity than when imported; or if the spirits so entered shall be found, at the time when the same shall be delivered, to be from natural waste decreased and less in quantity than when imported, lodged, and secured as aforesaid, the amount of such loss being ascertained by deducting the number of gallons so delivered for exportation, computed at the strength of proof, from the number of gallons imported, computed at the strength of proof; or if the coffee, cocoa nuts, or pepper so delivered, shall be found to be from natural waste less in weight than when imported, the importer or proprietor shall not be charged with any duty for any such decreased quantities, unless they shall exceed or be more than the proportions following; *videlicet*—One gallon of wine upon every cask which shall have remained in the warehouse for any period not exceeding one year; two gallons, for one year and not exceeding two years; three gallons, for two years; and one gallon, hydrometer proof, of spirits for every one hundred gallons, and after the same rate for any less quantity for any period not exceeding six months; two gallons for every one hundred gallons, for six months and not exceeding twelve months; three gallons for every one hundred gallons, for twelve months and not exceeding eighteen months; four gallons for every one hundred gallons, for eighteen months and not exceeding two years; and five gallons for every one hundred gallons, for any period exceeding two years: and two pounds for every one hundred pounds of coffee, cocoa nuts, and pepper respectively, and so in proportion for any less quantity. § 66.

And every cask of wine and of spirits shall be re-gauged, and the strength of the spirits in each cask re-examined by the proper officer, with the hydrometer, at the time of being delivered; and such officer is authorized to draw from every such cask of spirits a fresh sample of half a pint of such spirits, returning such sample, when found of or below the strength at which such spirits were imported, to the cask from which such sample was drawn. § 67.

The treasury may direct the mode of ascertaining the increase or decrease of any goods warehoused, and the charge or allowance in consequence of such increase or decrease. § 68.

And if any goods or merchandize, warehoused under this act, shall be embezzled, or fraudulently or clandestinely hid or concealed in, or fraudulently or clandestinely removed, all such goods, together with the packages, shall be forfeited, and shall and may be seized by any officer of the customs or excise; and the person or persons so embezzling, or aiding or assisting therein, or to whose hands the same shall knowingly come, shall be liable to the like

pains and penalties as if such goods and merchandize had been fraudulently unshipped or landed without payment of duty. § 70.

And if any proprietor or importer of brandy, rum, geneva, or other spirits lodged and put into any warehouse, shall, by any means, art, device, or contrivance whatever, open any such warehouse, except in the presence of the proper warehouse keeper, or other officer of the customs or excise, every such importer or proprietor shall forfeit for every such offence the sum of five hundred pounds. § 71.

In case it shall happen that any embezzlement, waste, spoil, or destruction shall be made in any goods through any wilful misconduct of any officer of customs or excise, such officer shall be deemed guilty of a misdemeanor; and if prosecuted to conviction, no duty of customs or excise shall be payable for such goods, and the damage shall be made good by the commissioners of customs or excise. § 72.

Any importer or proprietor may take any moderate samples of any goods or merchandize, as shall be allowed and directed by the commissioners of customs or excise, without entry or payment of any duty in respect of such samples. § 73.

And any officer of excise, before the delivery of any brandy, rum, geneva, or other spirits for exportation, or of rum or spirits of the British plantations, to be shipped as stores, may take one sample, not exceeding half a pint, out of each of the casks or packages, paying for such (if demanded) at and after the rate of 3s. per gallon; and if any person shall obstruct any officer in taking such sample, upon his offering to pay for the same (if demanded), the person offending shall forfeit the sum of 100*l*. § 74.

Importers may separate damaged coffee from the undamaged; and the bags or casks, when coffee is repacked, must be marked as follows: viz. on every bag or cask containing the coffee so separated as undamaged, the word "Sound," in black paint, in the front of each bag, or on the head of each cask, in letters at least two inches long; and upon the casks or bags containing the coffee set apart as damaged, the words "For Exportation." § 75.

Before any officer of excise shall proceed to select and separate coffee, he shall give notice thereof; and if it shall appear that, from negligence or ignorance, or from any other cause, a greater or smaller proportion is selected as damaged and unfit for use, then the commissioners of the excise may order such coffee to be surveyed by two indifferent and disinterested merchants or brokers; provided, the reasonable expence of the persons so to be employed shall be borne by the proprietor or consignee; provided also, that no damaged coffee shall be delivered out of warehouse until the same shall have been re-packed for exportation in casks, bags, or packages, containing each not less than one hundred pounds net weight avoirdupois, except by the special permission of the commissioners of excise, and on security being first given by the exporter, at the rate of 10*l*. per hundred weight, that the same shall be duly exported. § 76.

Damaged coffee may be mixed with other parcels of damaged coffee to make up the quantity of one hundred pounds. § 77.

Upon the separation of any coffee, the damaged parts shall be put into the packages in which the same were imported, beginning with the lowest number, and following in regular numerical order; and it shall be lawful for the importer or proprietor, to enter and pay the duties for any undamaged coffee for home consumption, and to remove the same from out of the warehouse, notwithstanding the quantity of such undamaged coffee may, in any one bag of any consignment, be less in quantity than one hundred pounds weight. § 78.

Where such separation of undamaged from damaged coffee shall have been made, a correct account shall be taken by the proper officer of excise, of the damaged coffee remaining in the original packages, and of the quantities of all undamaged coffee. § 79.

Any proprietor or consignee of any pepper, in the presence of the proper officer of excise, may separate from any parcel or quantity of such pepper, all stones, dirt, trash, and dust that shall be mixed therewith: the duty upon which is not to be charged. § 80.

No watch of foreign manufacture shall be imported and warehoused, upon the case of which any mark or stamp shall be impressed, which shall be similar to, or shall purport to be, or shall be intended to represent any mark or stamp of the goldsmith's company of London, or other legal British assay marks or stamps; and no clock or watch of foreign manufacture shall be so imported and warehoused, upon the face or upon any part of which the word *London*, or the name of any other town or place of the United Kingdom, shall be engraven or painted, or shall in any way appear, so as to purport or give colour that such clock or watch is of the manufacture of the United Kingdom; and no clock or watch of foreign manufacture shall be so imported and warehoused, unless a distinguishing number, and the name or names of some person and place, shall be engraven, and shall appear visible on the frame or other part of such clock or watch independent of the face, purporting to be the name and place of abode of the person or persons by whom such clock or watch was made; and no clock or watch of foreign manufacture shall be imported and warehoused in any incomplete state; that is to say, not having the movement, with all its concomitant parts, properly fixed and secured in its case, on pain of the forfeiture of such watch or clock. § 81.

And upon every sale fairly and *bonâ fide* made by the importer or proprietor of any goods or merchandize, the possession thereof shall by such sale be transferred to the purchaser thereof, although such goods shall remain in such warehouse; and such goods shall not pass to or be vested in any assignee or assignees of such importer or proprietor under any commission of bankrupt: provided, that upon every such sale, there shall have been a written agreement, signed by the parties, or a written contract of sale, made, executed, and delivered by a broker or other person legally authorized for and on behalf of the parties respectively, and the amount of the price stipulated in the said contract or agreement shall have been actually paid or secured to be paid by the purchaser, and that a transfer

shall have been entered in a book to be kept for that purpose by his majesty's officer of revenue having charge of such warehouse. § 82.

All goods or merchandize which shall be landed in docks, and lodged in the custody of the proprietors under the provisions of this act, not being goods seized as forfeited to his majesty, shall, when so landed, continue and be subject to such and the same claim for freight in favour of the master and owner of the respective ships or vessels, or of any other person interested in the freight of the same, from or out of which such goods or merchandize shall be so landed, as such goods, wares, or merchandize respectively were subject and liable to whilst the same were on board such ships. § 83.

And in case any goods or merchandize on which the full duties shall have been paid, and which shall afterwards be delivered or taken from any warehouse or other place where the same shall have been lodged or secured, shall be duly exported to foreign parts, the exporter thereof shall be allowed the like drawbacks of the duties as are now payable by law, as would have been allowed on the exportation of any such goods or merchandize respectively in case this act had not been made: provided, that no drawbacks of the duties of customs or excise shall be allowed or paid upon the exportation to any British colony, plantation, territory, or dominion in America or the West Indies, upon any of the goods or merchandize of foreign manufacture mentioned in Schedule (B.) § 85.

The occupier of warehouses is answerable for duties on goods removed without a warrant of the officer. § 86.

Where foreign goods are lost or destroyed by accidental staving, or by other unavoidable accident, the duty may be remitted, on proof to the commissioners of customs or excise. § 87.

If any person shall molest, disturb, hinder, oppose, or impede any officer of customs or excise in the due execution of the powers or authorities by this act granted, every person so offending shall forfeit the sum of one hundred pounds. § 92.

And in case any goods warehoused shall be destroyed by fire, it shall not be lawful for the importer, proprietor, or consignee, to demand, against his majesty, any compensation for or on account of such goods; and no duty of customs or excise shall be demanded for any goods or merchandize so destroyed. § 95.

Nothing in this act shall extend to permit the importation, at any time before the 5th day of July, 1825, of any wrought silks, or of any silk manufactures whatever, the importation of which is prohibited by any act of parliament; nor to permit the importation of any foreign linens, under the provisions or for the purposes of this act, without payment of the duties due at the time of the first entry thereof; nor the exportation of any foreign linen warehoused under the provisions of this act, without payment of the duties due on the exportation thereof under any act or acts in force immediately before the passing of this act. § 96.

Actions brought against any person or persons for things done or performed in pursuance of this act, must be commenced within three calendar months. § 97.

SCHEDULES to which this Act refers.

SCHEDULE (A.)

A List of Goods and Merchandize imported into Great Britain, which may be lodged and deposited only in warehouses inclosed by and surrounded with walls, or in other warehouses or places of special security, especially to be approved by the Commissioners of the Treasury, as directed by the act to which this Schedule is annexed, without the duties due on the importation thereof being first paid.

Agates, polished and rough; almond paste; aloes; ambraliqvide; ambergris; balsams of all sorts; beads of all kinds; beer; benjamin; bottles; bugles of all kinds; cambric; camphor; candles; cantharides; cardamoms; cards; carmine; cassia buds; cassia lignea; cassia fistula; castor; China ware and porcelain; crystal; cider; cinnamon (imported under licence); citron water; civet; clocks; cloves (imported under licence); cochineal; coculus indicus; coloquintida; columbo root; coral of all sorts; corks, ready made; cuttle shells; dice; enamel; essences of all sorts; extracts of all sorts; feathers, ostrich, and others not otherwise enumerated, whether dressed or undressed; flowers, artificial; garnets; gauze of all kinds; ginger, preserved; glass of all kinds; grains of Paradise and of Guinea; gum opoponax; hair (human); hair powder; hats and bonnets of all sorts; jalap; jet; jewels, emeralds, rubies, and all other precious stones, except diamonds; incle, wrought; lace of all kinds; lapis lazuli; mace, if imported by licence; manua; mercury; metheglin; morels; musical boxes; musk; myrrh; nutmegs (if imported by licence); nux vomica; opium; or moulu; otto of roses; paper; pearls; perry; pictures; plate; platina; plating of all sorts; powder of brass; powder of bronze; powder not enumerated, or otherwise described, which will serve for the same use as starch; quicksilver; radix ipecacuanhæ; radix rhatanæ; resina jalapæ; rhubarb; saffron; sal limonum; sal succini; salt; scammony; silk, raw and organzined; snuff; soap; spikenard; starch; stones; bezoar; storax of all kinds; succades; sugar; threads of all kinds; tobacco; tortoise-shell; treacle of Venice; truffles; turbit; vanelloes; vellum; verdigris; vinegar; watches of all sorts; watch glasses; waters, mineral; waters, strong, of all sorts; wires; yarn, mohair. And also all goods and merchandize of every description, which, under the provisions of this act, may be imported for the purpose of exportation only.

SCHEDULE (B)

A List of Articles of Foreign Manufacture or Produce, which, before exportation to the British colonies, plantations, territories, or dominions in America or the West-Indies, shall pay the home consumption duties.

Bandstrings, twist; baskets; blacking; bladders; books; boxes; brass, manufactured; bricks and clinkers; butter; cables; cambrics; candles; caps of cotton or worsted; cards; carriages; casks (empty) or packs; cheese; China ware or porcelain; cider; cinders; clocks; comfits; copper of all sorts; cordage; corks, ready made; cotton, manufactured; crayons; culm; dice; down; earthenware; enamel; extracts of all kinds; flowers, artificial; gauze of thread; glass, or bottles made of glass; hair powder; hops; ink for printing; iron, wrought or manufactured; jewellery and trinkets, manufactured of gold, silver, or any other metal; lace; lard; lead, red and white; leather, manufactured; linens; matting; mattresses; musical instruments; seed oils; oil or blubber of foreign fishing; spermaceti of foreign fishing; paper; painters' colours; paintings on glass; pens; picture frames; pomatum; powders of all sorts;

silks of all kinds, except of the manufacture of Persia, China, or the East Indies; skates; slate pencils; snuff; soap, hard and soft; starch; steel, manufactured; stockings of cotton or thread; stuffs of all sorts of wool; sugar-candy and sugar refined; tapes; tapestry; threads; ticking; ticks; tiles; tin foil; telescopes; tobacco, manufactured; tobacco pipes; tooth powder; twine; varnish; vellum; verjuice; vinegar; wafers; watch glasses; watches of gold, silver, or other metal; whip-cord; wires of all kinds; woollen manufactures of all kinds.

By the 5 Geo. IV. c. 43. § 3. the commissioners of his Majesty's Treasury may permit any person to import into the United Kingdom of Great Britain and Ireland, samples of spirits, wine, coffee, cocoa nuts, tobacco, snuff, and pepper, in phials, parcels, and packages as follows; (that is to say)—Spirits in phials not exceeding half a pint each, wine in phials not exceeding one pint each, coffee, cocoa nuts, and pepper, in parcels not exceeding a quarter of a pound each, and tobacco in parcels not exceeding two pounds each, and snuff in parcels not exceeding one pound each; provided the master of the vessel in which such samples shall be imported specifies, in his manifest and report, the several phials and parcels, the kind of goods and number of samples contained in each package, and that each phial, parcel, and package be marked in large letters with the word "Sample" on the outside thereof: provided always, that the importation of samples of tobacco and snuff shall be confined to those ports at which tobacco is now by law allowed to be imported.

And the importer of any wine in packages, each of which shall contain at least six dozen reputed pint bottles or flasks, may lodge and deposit or secure such wine in warehouses without payment of any duty, either customs or excise, at the time of the first entry, subject to the several rules, regulations, conditions, and securities, as well with respect to the port as to the warehouses in which such wine may be lodged and secured, as are specially provided and contained in the act of the 4 Geo. IV. c. 24.

And it shall be lawful to import Cologne water in cases containing six flasks in each case, thirty of such flasks containing not more than one gallon, upon payment of the sum of one shilling for each flask; and all Cologne water imported otherwise than in such cases, shall be subject and liable to all such duties on the importation thereof into any part of the United Kingdom, as before the passing of this act. § 16.

Bribing Officers.

The act of 51 Geo. III. c. 71. whereby all fees or perquisites are prohibited to be taken by any clerk or other person employed in the customs, having been found to be ineffectual by reason of persons offering bribes to officers and others, it is enacted by 1 Geo. IV. c. 7. that if any person shall give, offer, or promise to give any fee, perquisite, gratuity, or reward to any officer, clerk, &c. for any service, act, duty, matter, or thing to be done by such officer, &c. every such person or persons so offering to bribe shall forfeit the sum of 500*l.* for every such offence.

ASSESSED TAXES.

WINDOW DUTY.—4 Geo. IV. c. 11.

For every dwelling-house containing not more than six windows or lights (except houses worth 5*l.* a year, and charged with the duty on inhabited houses *£. s. d.* hereafter mentioned) the yearly sum of..... 0 3 3

Not more than six windows or lights, if of the value before mentioned, and charged to the said rate or duty accordingly, the yearly sum of 0 4 0

7	....	£0	10	0	25	.....	£7	14	3	55 to	59..	18	13	0
8	.....	0	16	6	26	.....	8	2	9	60 -	64..	18	17	9
9	.....	1	1	0	27	.....	8	11	0	65 -	69..	21	0	3
10	.....	1	8	0	28	.....	8	18	6	70 -	74..	22	2	6
11	.....	1	16	3	29	.....	9	8	0	75 -	79..	23	5	0
12	.....	2	4	9	30	.....	9	16	3	80 -	84..	24	7	6
13	.....	2	13	3	31	.....	10	4	9	85 -	89..	25	10	0
14	.....	3	1	9	32	.....	10	13	3	90 -	94..	26	12	6
15	.....	3	10	0	33	.....	11	1	6	95 -	99..	27	14	9
16	.....	3	18	6	34	.....	11	10	0	100 -	109..	29	8	6
17	.....	4	7	0	35	.....	11	18	3	110 -	119..	31	13	3
18	.....	4	15	3	36	.....	12	6	9	120 -	129..	33	18	3
19	.....	5	3	9	37	.....	12	15	3	130 -	139..	36	3	0
20	.....	5	12	3	38	.....	13	3	6	140 -	149..	38	8	0
21	.....	6	0	6	39	.....	13	12	0	150 -	159..	40	12	9
22	.....	6	9	0	40 to	44..	14	8	9	160 -	169..	42	17	9
23	.....	6	17	6	45 -	49..	15	14	9	170 -	179..	45	2	6
24	.....	7	5	9	50 -	54..	17	5	0	180	.....	46	11	3

And for every window above 180, 1*s.* 6*d.*

Rules for charging Windows.

1. The duties to be charged yearly upon the occupier, for one year from April the 5th, to be levied on such occupier.

2. Where any change in the occupation shall take place after the assessments, then the duties charged on the occupier shall be paid by the occupier, landlord, or owner, for the time being. But where a tenant shall quit on the termination of a lease or demise, and shall have given notice to the assessor, the duty shall be discharged for the remainder of that year.

3. Where any dwelling-house is let in different apartments, and shall be inhabited by two or more persons, the same shall be charged as if such house were inhabited by one only; and the landlord or owner shall be deemed to be the occupier.

4. Every house whereof the keeping is left to the care of any person, shall be subject to the like duties as if it were inhabited by the owner or tenant.

5. Every window, including the frame, partitions, and divisions thereof, which by admeasurement of the whole space on the aperture of the wall of the house on the outside, shall exceed in height twelve feet, or in breadth four feet nine inches, is chargeable as two windows, except—1. Windows which are not more than three feet six inches in height, although above four feet nine inches in breadth. 2. Windows which were made of greater dimensions previous to the 5th of April, 1785. 3. Windows in shops, work-shops, and warehouses employed solely for the purpose of trade, or as warehouses, provided no person dwells in the same. 4. Windows in the coffee-room, tap-room, or any other public room, of any house licensed to sell wine, ale, &c. And, 5. Windows or lights in farm-houses which are exempt from the inhabited house duty; as also windows in dwelling-houses not chargeable with the said duty.

6. Every window extending so far as to give light into more rooms, landings, or stories than one, shall be charged separate.

7. When a partition or a division between two or more windows fixed in one frame is of the breadth of twelve inches, the window on each side shall be charged as a distinct window.

8. All sky-lights, and windows in staircases, garrets, cellars, passages, and all other parts of dwelling-houses, shall be charged.

9. Every window in any kitchen, cellar, scullery, buttery, pantry, larder, wash-house, laundry, bakehouse, brewhouse, and lodging room, belonging to any dwelling-house, shall also be charged.

Exemptions.

1. Houses belonging to his majesty, the royal family, and public offices.

2. Hospitals, charity schools, or houses provided for the reception and relief of poor persons, except such apartments therein as are occupied by the officers or servants.

3. The windows in any room licensed for divine worship.

But every such hospital, &c. shall be brought into charge by the assessors; and the commissioners may discharge such hospital, charity-school, and house for poor persons, &c.

4. The windows or lights in any dairy or cheese room belonging to and occupied with any dwelling-house, provided the windows shall be made with splines or wooden latlis, or iron bars, or wires, and wholly without glass, and that the occupiers shall paint on the outer door, on the outside of the windows, in large Roman letters, the words "Dairy, or Cheese Room." And by 57 Geo. III. c. 25. one glazed window or light in every dairy in a farm-house.

5. And by 50 Geo. III. c. 104. windows in any room used wholly for the purpose of carrying on any manufacture.

6. By 57 Geo. III. c. 25. tenements which have been formerly occupied as dwelling-houses shall not be charged when used for the purposes of trade only, or as warehouses, or shops or counting-houses. § 1.

Persons claiming relief must give notice to the assessor of

the place where such tenements are situate; who, on request made, shall be admitted, in the day-time, to inspect such tenements. § 2.

Mills, places of manufacture, or warehouses not attached to a dwelling-house, are not liable to the duties on houses or windows, though a servant be appointed to watch and guard the same in the night-time, provided such servant be named in a licence to be obtained from the commissioners of the district. § 4.

One window in any dairy or cheese room, whether glazed or made of splines, laths, bars, or wires, is exempted from duty. § 5.

Opening or Stopping-up Windows.

Windows or lights are not to be newly opened or made; nor are windows or lights, which are stopped up at the time the assessment for the current year is made, to be re-opened; neither are windows which are charged in the assessment to be stopped up, without six days' notice given to the surveyor or inspector of the district. Nor is any abatement to be allowed for any window stopped up after the commencement of the year for which the assessment is or ought to be made.

No window or light in any dwelling-house is to be exempted from the above duties because it is stopped up, unless it shall be so stopped with stone or brick, or with the same kind of materials whereof that part of the outside walls of such dwelling-house chiefly consists, or unless it was effectually stopped up with plaster upon lath previous to the 10th of May, 1798. Nor shall windows in the roof of such dwelling house be exempt, unless the same be effectually stopped up with materials similar to the outside of the roof.

Assessors' Right of Examining Number of Windows, &c.

Assessors have full power, at all seasonable times, to pass through any house, or go into any court or yard, and externally to view the windows and lights in such house, and the premises occupied therewith, and to measure such windows or lights externally or internally.

HOUSE DUTY.

For every inhabited house, which, with the household and other offices, yards, and gardens, therewith occupied and charged, is, or shall be worth 5*l.* and under 20*l.*

rent by the year, the yearly sum of	0	1	6
20 <i>l.</i> and under 40 <i>l.</i> rent by the year, the sum of	0	2	3
40 <i>l.</i> rent by the year and upwards	0	2	10

Rules for charging the Duties.

1. The duties to be charged on the occupier of every inhabited dwelling-house, with the household and other offices, yards, and gardens, therewith occupied, *to the full and just yearly rent at which the same is worth to be let*, whether such occupier shall or shall not be entitled to be discharged therefrom in respect of window-duty on houses not having six windows.

2. In charging these duties, every coach-house, stable, brew-house, wash-house, laundry, wood-house, bake-house, dairy, and all other offices, and all yards, courts, and curtilages, gardens, and pleasure-grounds, occupied with any dwelling-house, are to be valued together with such dwelling-house, provided no more than one acre of such gardens and pleasure-grounds shall be so valued.

3. All shops or warehouses attached to, or having any communication with the dwelling-house are to be valued together with the dwelling-house and offices; but such warehouses and buildings upon, or near to wharfs, are not subject to these duties, although the wharfingers or their servants have dwelling-houses on them.

4. Neither are such warehouses as are distinct and separate buildings, and not parts of the dwelling-house or shop, but used solely for lodging of goods or carrying on some manufacture, although the same may adjoin to, or have a communication with the house or shop.

5. Dwelling-houses divided into different tenements to be assessed separately to these duties.

6. That every dwelling-house, together with the premises described in Rule 2, may be charged to the full and just yearly rent at which the same is really worth to be let. No dwelling-house, with such premises, is to be rated at less than the full annual value at which the same is charged in the last poor-rate; but if such poor-rate shall have been made throughout by a pound-rate on the full annual value of all the houses, then the assessment is to be made according to the said rate. But if the poor's rate is not made on the full annual value, nor according to any proportionate part thereof, then the assessment is to be made on the actual rent which shall have been paid within the last three years.

7. And in all cases where the above rules are not applicable, the assessment is to be made on the full annual value, or the actual amount of the rent at which such dwelling-house and the premises herein-before mentioned, are let, or, if not let, the annual rent at which they are worth to be let.

Exemptions from the said Duties.

1. Houses belonging to his Majesty, or any of the Royal Family, and every public office, for which the duties heretofore payable have been paid by his Majesty, or out of the public revenue.

2. Every dwelling-house, being a farm-house, occupied by a tenant, and *bonâ fide* used for the purpose of husbandry only.

3. Every dwelling-house, being a farm-house, occupied by the owner thereof, and *bonâ fide* used for the purpose of husbandry only, which, together with the household and other offices aforesaid, shall be valued under this act at ten pounds per annum, or any less sum.

4. Any hospital, charity-school, or house provided for the reception or relief of poor persons.

5. Every house, whereof the keeping is left to the care of any person or servant who does not pay rates to the church and poor, and who resides therein for the purpose only of taking care thereof.

MALE SERVANTS.

In or out of Livery.

For 1 Servant.....	£1	4	0	For 7 Servants.....	£18	7	6
2 do.	3	2	0	8 do.	22	8	0
3 do.	5	14	0	9 do.	27	9	0
4 do.	8	14	0	10 do.	33	5	0
5 do.	12	5	0	11 do.	42	1	6
6 do.	15	9	0				

And an additional 3*l.* 16*s.* 6*d.* for every other servant.

- Servant employed by any male person, never having been married, the further sum of£ 1 0 0
- The duties on male servants are to be charged for every gardiner who shall have contracted for the keeping of any garden wherein the constant labour of one person shall be necessary, or where he is constantly employed therein; but occasional gardeners are exempt.
- For every male traveller, or rider,* employed by any merchant or trader 1 10 0
- And where more than one is so employed, there shall be charged for each 2 10 0
- For every male clerk, book-keeper, or office-keeper, overseer or clerk to ditto (except apprentices, with whom no fee or less than 20*l.* has been paid) 1 0 0
- Where more than one is employed, for each 1 10 0
- For every male person employed as a steward, bailiff, overseer, or manager, or clerk under a steward, bailiff, overseer, or manager 1 0 0
- For every male shopman, warehouseman, or porter, except apprentices aforesaid), whether in a wholesale or retail shop or warehouse 1 0 0
- And for every male person so employed, where the duty by the former act shall not be chargeable (see 52 Geo. III. c. 93.) 1 0 0
- For every male servant employed as a waiter (except occasional waiters over and above the ordinary number usually kept) in any tavern, inn, &c. 1 10 0
- If employed as an occasional waiter for six calendar months in one year 1 0 0
- For a less period 0 10 0
- If employed as such six times within the year 0 10 0
- Every male person (not being a servant) employed as an occasional waiter in any *private house*, not less than six times within the year 0 10 0
- For every male servant kept by a stable-keeper to take care of race horses, whereby the stable-keeper may gain a livelihood or profit 1 0 0

* Traders who employ persons to travel from place to place on foot, are exempted by the 50 Geo. III. c. 118. for every male person so employed above the number of four.

Servants let to Hire.

For every coachman, postillion, groom, or helper, kept to be let out to hire for less than a year, and in such manner that the duty payable on horses let to hire shall not be paid by the innkeeper, postmaster, &c. or by the coachmaker, or other person *annual* 1 5 0

And for every coachman kept for the purpose of driving any stage coach, and for every guard 1 5 0

The said duty to be paid by the persons letting the same to hire; but if the persons hiring the same shall not make a return thereof, then the progressive duty payable on servants shall be chargeable in respect of every such servant on the person hiring and making default, according to the number of servants retained by him; and he shall also forfeit for such default 50*l*.

Exemptions from the Duties on Male Servants.

Male servants employed in any trade, manufacture, or calling, or in husbandry, to earn a livelihood or profit, and not in any capacity already chargeable.

Butlers, manciples, cooks, gardeners, or porters, employed by any of the Royal Family, in either university, or in the colleges of Westminster, Eton, or Winchester.

Christ's Hospital, St. Bartholomew's, Guy's, St. Thomas's, Bridewell, Bethlem, and the Foundling.

In the navy, all officers below the rank of master and commander, in actual employ; and in the army, all officers below those holding the rank, or receiving the pay of a field officer, shall be exempted from paying the duty for a servant who is actually a soldier or a sailor in the same regiment or ship.

The duties are not to be payable for any person retained or employed in the room of others, who may be called out under any act for training and exercising a military force, during the time of such training and exercising.

And by the 5 Geo. IV. c. 44. § 6. to remove doubts which had arisen, whether the respective duties chargeable on porters, and on overseers or managers, extend to the employment of male persons on certain occasions, it is enacted, that any male person hired by the employer or employers by the year, or by the week, or otherwise, shall not be deemed and taken to be a porter chargeable with the duties, for or by reason of his employment in the loading, unloading, stowage, or removal of goods, wares, or merchandize, from, to, or upon any horse, cart, waggon, or other carriage, in the receipt or delivery of such goods, wares, or merchandize at the shop, warehouse, or place of deposit, unless such person shall also be employed in the drawing or taking of samples of goods, wares, or merchandize exhibited for the purposes of sale at such shop or warehouse, or elsewhere; nor shall any person wholly employed in any mine, adventure, or concern, under the superintendence and authority of one or more manager or managers, or one or more clerk or clerks, in such mine, adventure, or concern, (where the person or persons liable to the duties shall be assessed

for the duty for one overseer or manager at the least, and also for one clerk at the least,) be deemed and taken to be an overseer or manager, or a clerk under an overseer or manager chargeable with duty, by reason of the employment of any such person under such manager or clerk in the overlooking and checking of labourers in the performance of the work and labour allotted to them in any such mine, adventure, or concern, and in accounting for the same to any such manager or clerk.

Also, officers on half-pay, from the navy, army, or marines, (disabled), keeping only one servant, are exempt.

TAX ON DOGS.

For every greyhound.....	£1	0	0
For every hound, pointer, setting-dog, spaniel, lurcher, or terrier.....	0	14	0
For a single dog, of any other species, kept by or for the use of any person inhabiting a dwelling-house assessed to any of the duties on houses or windows.....	0	8	0
Those who keep two or more dogs, of whatever denomi- nation, for each dog.....	0	14	0
Composition for hounds, per annum.....	36	0	0
Whelps under six months old are exempt.			

Persons not paying king's taxes may keep one dog, if not a greyhound, hound, &c.

Exemptions.

By the 5 Geo. IV. c. 44. § 5. any person occupying a farm of less value than 100*l.* per annum, and making a livelihood solely thereby, as owner or tenant in the manner described in the acts granting exemptions from the duties on horses, mares, or geldings kept by such occupiers, and rode on the occasions therein mentioned, shall be exempt from the duty by the said acts granted in respect of any dog or dogs, not being a greyhound, hound, pointer, setting dog, spaniel, lurcher, or terrier, which shall have been or shall be *bonâ fide* and wholly kept and used by such occupier, or by any person employed by him or her as a shepherd, on his or her said farm in the care of sheep.

PLEASURE HORSES,

Used either for riding or drawing Carriages.

For 1 such horse...	£1	8	9	11 horses.....total	£34	18	6
2....total duty.	4	14	6	12.....	38	2	0
3.....	7	16	9	13.....	41	8	9
4.....	11	0	0	14.....	44	12	6
5.....	13	18	9	15.....	47	16	3
6.....	17	8	0	16.....	51	0	0
7.....	20	18	3	17.....	54	8	0
8.....	23	18	0	18.....	58	1	0
9.....	27	6	9	19.....	61	15	0
10.....	31	15	0	20.....	66	0	0

And an additional 3*l.* 6*s.* for every other horse.

Horses let to hire for less than a year, in any manner so that the stamp-office duty, payable on horses let to hire, shall not be payable, the sum of	1	8	9
Race horses	1	8	9
Horses or mules for labour, thirteen hands high	0	10	6
— ditto, not thirteen hands high	0	1	6

But horses used in husbandry, or drawing any carriage not liable to duty, or carrying burdens in the course of the trade or occupation of the person to whom such horse shall belong, if rode only when going for a load, or returning, or going for medical assistance, or to or from any market, or place of public worship, election of members of parliament, or to or from any court of justice, or to or from any meeting of commissioners of taxes, are exempt.

OTHER HORSES, &c.

Waggoners' and carriers' horses	£0	10	6
Butcher,* for one horse used wholly in his trade	1	8	9
But for a second horse	0	10	6
Horses not exceeding thirteen hands high, used for riding or drawing any carriage	1	1	0

(But former exemptions are to continue).

One horse employed by any bailiff upon the concern of any farms he may be entrusted with 1 | 5 | 0 |

By the 1 & 2 Geo. IV. c. 110, it is enacted, that from and after the 5th of April, 1822, the several duties on persons in respect of horses, mares, geldings, or mules, kept and used solely for the purpose of husbandry in Great Britain, and all assessments thereon, shall severally cease and determine.

And it is further enacted, that from and after the 5th of April, 1821, the duties on mules, shall cease and determine in respect of all and every the person or persons who shall seek his, her, or their livelihood by the carriage or conveyance of ore, slate, stone, coal, or culm, to or from the mine or pit, or by the carriage of lime, sea-sand, sea-weed, or other manure; provided that such ore, slate, or stone, or coal, or culm, sea-sand, sea-weed, or other manure, be loaded on the backs of such mule, and not otherwise.

CARRIAGES WITH FOUR WHEELS.

For 1 Carriage....	£6	0	0
2 do.....	13	0	0
3 do.....	21	0	0
4 do.....	30	0	0
5 do.....	39	7	6
For 6 Carriages....	£49	4	0
7 do.....	59	10	0
8 do.....	70	8	0
9 do.....	81	13	6

And an additional 9*l.* 1*s.* 6*d.* for every other carriage.

* By the 1 & 2 Geo. IV. § 37. no butcher is to be deprived of any exemption for or on account of one horse to be used by him or his servants solely for the purpose of trade, to which he would have been entitled under any act or acts relating to assessed taxes in force previous to the 59 Geo. III. c. 13.

For every additional body successively used on the same carriage or number of wheels.....	3	3	0
Four-wheel carriages, let to hire for less than twenty-eight days, and post chaises, if duly entered as such with the commissioners of stamps.....	5	5	0
If not entered	6	0	0

CARRIAGES WITH TWO WHEELS.

When kept for a person's use, or let out to hire, and drawn by one horse.....	£3	5	0
Drawn by two or more horses.....	4	10	0
For every additional body, successively used on the same carriage or number of wheels.....	£1	11	6

Exemptions from the Duty on Carriages.

Coaches licensed by the commissioners for hackney coaches within the cities of London and Westminster.

Carriages kept by any coachmaker or maker of carriages, *bond fide* for sale, or for the purpose of being lent to any person during the time such person's carriage of the same description shall be under repair, and never employed for his own use, or let to hire, or otherwise lent than as aforesaid. Any common stage cart, kept truly and without fraud to be used wholly in the affairs of husbandry, or in the carriage of goods in the course of trade, and whereon the name and place of residence of the owner, and the words "Common Stage Cart," shall be legibly painted, although the owner, or his or herservant, shall or may, for the purpose of driving or conducting the same only, occasionally ride therein or thereon when laden or when returning from the place to which, or when going to any place from which any load shall have been or shall be to be carried in such cart in the course of husbandry or trade; or which shall be used for conveying the owners thereof or their families to or from any place of divine worship on Sunday, Christmas-Day, or Good-Friday, or on any day of a public fast or thanksgiving; or for carrying persons going to or returning from the elections of members to serve in parliament; in case such carriage shall not have been or be used for any other purpose of riding thereon or therein, save as aforesaid, or shall not have been or be let to hire for any of such purposes of riding therein or thereon.

TAXED CARTS.

By the 4 Geo. IV. c. 11. the duty on taxed carts is repealed. But they must be built and constructed wholly of wood and iron, without any covering other than a tilted covering, and without any lining, and with a fixed seat without slings or braces, and without any ornament, other than paint of a dark colour, for the preservation of the wood or iron only; and it shall be lawful for any person or persons keeping and using any horse, mare, gelding, or

mule, *bond fide* for the purposes of husbandry, to use any such in drawing any carriage of the description of a taxed cart, the duty whereon is repealed by this act, and kept by any such person for his own use, free of any duty chargeable under the said acts, in respect of any such horse, mare, gelding, or mule.

HORSE-DEALERS.

Every person who shall use and exercise the trade and business of a horse-dealer within London and Westminster, and the liberties of the same respectively, the parishes of St. Mary-le-bone and St. Pancras, the weekly bills of mortality, or the borough of Southwark, in the county of Surrey, the annual duty of, £25 0 0

Every person who shall use the trade or business in any other part of Great Britain.....12 10 0

Horse-dealers are to deliver a list of such horses as they keep for riding or drawing.

COACH-MAKERS, &c.

Persons carrying on the trade, annually.....£0 10 0

Each carriage with four wheels, built for sale..... 1 6 0

Ditto with two-wheels 0 12 6

Taxed Cart 0 3 0

The above duties are also payable by persons *selling* any such carriage, &c. by auction or commission.

HAIR POWDER.

Wearing hair powder, each person, annually.....£1 3 6

But payment for two unmarried daughters will exempt the rest.

Exemptions.

Any of the Royal Family, and any menial servants of his Majesty, or any of the Royal Family.

Any officer in actual employ in the navy, under the rank of commander, or any officer holding commission in the navy under the said rank, who shall be employed on the establishment of Greenwich, or any subaltern or non-commissioned officer or private in the army, artillery, militia, marines, or corps of engineers, or any person enrolled and actually serving in any volunteer corps, whether of infantry or cavalry.

Any clergyman who shall not be possessed of an annual income of 100*l.* or upwards, whether arising from ecclesiastical preferment or otherwise; any preacher of any congregation of Dissenters, or any person dissenting from the church of England, in holy orders, or pretended holy orders, entitled to the benefit of the several Toleration acts in favour of the Dissenters and Papists, and who shall not be possessed of an annual income of 100*l.* or upwards, however arising; and the income arising from benefices shall be estimated on the average amount, computed on seven years next preceding.

ARMORIAL BEARINGS.

Every person chargeable for any carriage	£2	8	0
Without a carriage, but paying house duties	1	4	0
Every other person.....	0	12	0

GAME.

Certificate for taking or killing any game whatever, or woodcock, snipe, quail, landrail, or coney	£3	13	6
Game-keeper	1	5	0

COMPOSITION FOR THE ASSESSED TAXES.

By 59 Geo. III. c. 51. it is enacted, that the *assessments* made for the year ending on the 5th of April, 1819, shall *remain to the same amount*, in respect of all persons who shall compound for the annual payment thereof, for the term of three years, to commence from the said 5th day of April, 1819, upon the terms and conditions herein-after mentioned; and it shall be lawful for the commissioners acting in the execution of the Assessed-Tax Acts, for any county, city, town, or place, in Great Britain, or any two or more of them, to contract and agree with any person who is assessed for the said year ended on the 5th day of April, 1819, and who shall apply to them for that purpose, in the same division in which such assessment hath been made, for the composition of his assessed taxes for the said period of three years; and all persons assessed for the year ended as aforesaid are hereby respectively declared to be competent to enter into composition with the said respective commissioners for their assessed taxes, for the term of three years, to commence from the said 5th day of April, *on the same amount annually*, as shall have been assessed upon them for the year ended as aforesaid, together with an *additional annual rate of one shilling* for every *twenty shillings* of the amount so assessed, except the duty in respect of killing game. § 1, 2.

The compositions on the house and window duties are to be made separately and distinctly from all the other duties. § 2.

Compositions will entitle the persons compounding to *open additional windows*, and to *keep additional articles free of duty*, of the same description as those before charged, and will exempt from the provisions and assessments of Assessed-Tax Acts; except when chargeable for another dwelling-house, or for articles of a different description. § 3.

No composition shall be entered into with any person who shall have become chargeable in the present year by reason of any different or additional establishment set up within the year ending 5th of April, 1819, to a greater amount of duty than hath been charged on him in the said last year's assessment, without including the increased amount of duty so becoming chargeable by reason of such different or additional establishment, nor in any such case where a *bonâ fide* return of such different or increased establishment shall not be made before the 1st day of July, 1819. § 4.

No person shall be chargeable under the acts in force at the time of passing this act, after the expiration of the said term of three years, for any part of the increased establishment not included in the com-

position entered into under this act, who shall give six months previous notice of his intention to discontinue the same, and who shall actually have ceased to keep the same one calendar month prior to the expiration of the said period of three years. § 5.

When an establishment shall have consisted in part of articles whereon a less duty hath been made payable by any act in the present session of parliament, it shall be lawful to enter into compositions under this act, on the amount of duty charged on other articles on the said last assessment, together with the amount of duty so made chargeable by the said act of the present session.

Every composition entered into under this act, in respect of the duties charged on a dwelling-house, from which the person entering into the same shall remove during the term herein limited, shall cease and determine on the 5th of April next after such removal; and every composition entered into under this act, in respect of any other of the duties granted by the said acts; with any person who within the said term herein limited shall die, or become bankrupt or insolvent, or shall assign his goods, chattels, or effects, shall also cease and determine on the 1st of April next after such death, bankruptcy, insolvency, or assignment. § 7.

Compositions shall bind the party to the punctual payment of the amount. § 8.

Parties removing, and the executors and assigns of persons dying, or becoming bankrupt or insolvent, shall be answerable for the compositions at the end of the year. § 9.

The composition moneys shall be payable quarterly in the same manner as the assessed taxes; provided always, that every person so compounding, the amount of whose annual composition shall not be less than twenty pounds, may agree with the respective commissioners aforesaid for the payment of his composition money into the Bank of England, or to the receiver-general, or his lawful deputy, for the county or division where his composition money shall be payable, by half-yearly instalments, at the times and in the manner prescribed in this act; and all such half-yearly payments shall be made in equal portions on or before the first day of October and the first day of April in each year; and with respect to payments to be made to the receiver-general or his deputy, to require a receipt acknowledging such payments, at the cost and charge of the persons making such payments; and in every such case the said receiver-general, or his deputy as aforesaid, shall give the said persons a receipt as aforesaid, specifying therein the name of the person compounding as aforesaid, and the parish or place mentioned in the certificate of composition; which receipts shall be delivered over to the collectors, or one of them, of the parish or place where the assessment referred to by the certificate of composition shall have been made, by an indorsement under the hand of the person so compounding and paying, and shall be received by such collectors or collector as cash, and allowed as such by every receiver-general or his deputy, in his accounts with such collector. § 10.

The Bank shall open an account with the commissioners of the treasury: and the cashier of the Bank, who shall receive any money tendered to him in payment of not less than one moiety of the

money annually payable on any composition, shall enter the same in the book to be provided for that purpose; and the said cashier shall give the person paying the same a certificate of such payment, specifying therein the number of half-yearly instalments thereby discharged, and referring therein to the names or name of the person or persons so compounding, and the county and division mentioned in the certificate of composition then produced: provided always, that it shall be lawful for any person so authorized as aforesaid, to pay in advance to the governor and company of the Bank of England, or to their cashiers, any sum of money compounded for as aforesaid, and payable for the term of one whole year, and to require a certificate acknowledging such payment; and it shall be lawful for the cashiers, on production of the certificate of composition at the time of payment of the said duty in advance (all sums then payable on such composition for any former year or instalment being first satisfied), to make an allowance out of the sum so paid in advance, at the rate of *three pounds per centum per annum*; and all such certificates made out by the cashiers as aforesaid, being indorsed and delivered by the person so compounding to the collectors, or one of them, of the parish or place where the assessment shall have been made, shall be received by them as cash in satisfaction of the condition of such certificate, and allowed to them in their accounts with the receiver-general and his deputy as aforesaid. § 11.

The assessors of assessed taxes shall deliver the prescribed notices to all parties assessed in the last year; together with forms to be used in applications to compound. Persons desirous to compound may send their applications to the clerks of the commissioners, who are to summon the commissioners to take the applications into consideration. § 12.

The surveyors shall examine the assessments for the last year on persons applying to compound, and their returns for the present year; and if such surveyor shall find that any person who shall have applied to compound, hath removed from the dwelling-house charged in the last assessment, or hath returned any additional establishment as chargeable for the present year, so as to increase the amount of his assessment for the present year beyond the amount charged in the preceding year, or hath not made any return, or hath made an undue return for the present year, it shall be lawful for the said surveyor to certify the same to the said commissioners with his objections; and no composition shall be entered into in respect of the dwelling-house from which the person applying to compound hath removed; nor with any person who hath not made a due return of all articles, matters, and things chargeable upon him for the present year; and in case such due return shall have been made, no composition shall be entered into, without adding to the amount of last year's assessment the additional establishment chargeable in the present year, and calculating the additional rate payable under this act on such aggregate amount § 13.

Upon every composition entered into after the 1st day of October, 1819, there shall be paid one moiety within ten days after

the date of the certificate; and no such composition shall be entered into after the 31st day of the same month, nor after the person applying for the same shall have received a notice of an increased charge; nor after any appeal from the amount of the first assessment charged on the person so applying to compound for the present year. § 14.

Upon all applications to compound under this act, which shall not be objected to by the surveyor as aforesaid, the clerks to the commissioners shall prepare the certificates of composition to be signed by the commissioners and parties compounding. § 15.

All assessments to cease on persons compounding, except as before excepted. § 19.

On compositions not duly paid at the times prescribed, collectors may distrain for the money in arrear, with 1s. in the pound for their own use, and all costs and charges. § 19.

By the 1 and 2 Geo. IV. c. 113. persons who shall renew their compositions entered into under former acts, are allowed to keep and use free of duty, after the renewal of their compositions, whatever articles they may have set up under their former compositions, the same not being of a different description than those included in their former compositions. Persons who have not taken the benefit of former acts, but shall compound under the new act, will be entitled to the like privileges as under former acts, except that no person who shall compound on any carriage with two wheels, and not on any carriage with four wheels, will be entitled to set up, keep, or use any carriage with four wheels free of duty; also, that no person who shall compound for any dog or dogs other than hounds, can set up or keep free of duty any hound or hounds, nor can any person who shall compound for any less number of hounds than ten, set up, or keep free of duty, any additional number of hounds.

Under the new act, no composition can be entered into or renewed with any person in trade in respect of any articles kept for the purpose of trade; nor can any composition be entered into or renewed with two or more persons in partnership in trade, nor upon any carriages, horses, or other articles let, or used to hire.

Persons who shall have compounded for their establishments must have the notice papers, No. 2. A. left with them, as they may use articles not compounded for, or not allowed by the new composition act to be included in their contracts. The duties which persons cannot compound for are those in schedule C. No. 3 and 4. D. No. 3, 5, and 6. E. No. 2. F. No. 1 and 2. H. and L. of 48 Geo. III. cap. 55, and 52nd Geo. III. cap. 93, and the carriages described in the 58th Geo. III. cap. 17.

By the 4 Geo. IV. c. 11. § 3. that the commissioners of districts are to reduce so much of the duties compounded for as are repealed by this act, and to cause the reduced amounts to be inserted in the assessments of composition; and these contracts are to be in force for recovering payments of the reduced instalments.

By the 5 Geo. IV. c. 44. § 1. the time for composition of the assessed taxes is further extended, to continue for the term of four years from the 5th of April, 1824.

STAMP DUTIES.

RECEIPTS,

AMOUNTING to £2 and not amounting to			£5	....	£0	0	2
5	—	—	10	....	0	0	3
10	—	—	20	....	0	0	6
20	—	—	50	....	0	1	0
50	—	—	100	....	0	1	6
100	—	—	200	....	0	2	6
200	—	—	300	....	0	4	0
300	—	—	500	....	0	5	0
500	—	—	1000	....	0	7	6
1000, or upwards					0	10	0
Receipts in full of all demands					0	10	0

The stamp to be paid by the person giving the receipt, except when money is paid for the use of his Majesty.

Any person refusing to give a receipt upon demand, or to pay the amount of the stamp, is liable to the penalty of £10.

By 35 Geo. III. c. 55. every person who shall write or sign, or cause to be written or signed, any receipt, discharge, or acquittance, liable to duty, without the same being first duly stamped, or upon which there shall be a stamp of lower denomination than is charged in respect thereof, shall forfeit £10, if the sum paid shall not amount to £100; and £20, if it amount to £100 or upwards. §. 8.

And any note, memorandum, or writing whatsoever, given to any person for or upon the payment of money, whereby any sum of money, debt, or demand, or any part of any debt or demand therein specified, and amounting to two pounds or upwards, shall be expressed or acknowledged to have been paid, settled, balanced, or otherwise discharged or satisfied, or which shall import or signify any such acknowledgment, and whether the same shall or shall not be signed with the name of any person, shall be deemed and taken to be a receipt for a sum of money of equal amount with the sum, debt, or demand so expressed or acknowledged to have been paid, settled, balanced, or otherwise discharged or satisfied, within the intent and meaning of this schedule, and shall be charged with a duty accordingly. 55 Geo. III. c. 184.

PROMISSORY NOTES,

PAYABLE TO BEARER ON DEMAND, AND RE-ISSUABLE.

For any sum not exceeding £1. 1s.			£0	0	5
Exceeding £1. 1s. and not exceeding £2			2s.	0	0 10
2	2	— —	5	5	.... 0 1 3
5	5	— —	10	0	.... 0 1 9
10	0	— —	20	0	.... 0 2 0
20	0	— —	30	0	.... 0 3 0
30	0	— —	50	0	.... 0 5 0
50	0	— —	100	0	.... 0 8 6

Which said notes may be re-issued after payment thereof as often as shall be thought fit.

Promissory notes, payable in any other manner than to bearer on demand, and not intended to be re-issued, the same duty as on inland bills of exchange.

BILLS OF EXCHANGE.

Inland bills of exchange, drafts, or orders, for the payment to the bearer or to order, either on demand or otherwise—

		<i>Not exceeding Two Months.</i>			<i>Above Two Months.</i>		
Amounting to 40s. not exceeding £5 5s.	£0 1 0	£0 1 0	£0 1 0	£0 1 0	£0 1 0	£0 1 0	£0 1 0
Exceeding £5 5s..... 20.....	0	1	6..	0	2	0	0
20 30.....	0	2	0..	0	2	6	6
30 50.....	0	2	6..	0	3	6	6
50 100.....	0	3	6..	0	4	6	6
100 200.....	0	4	6..	0	5	0	0
200 300.....	0	5	0..	0	6	0	0
300 500.....	0	6	0..	0	8	6	6
500 1000.....	0	8	6..	0	12	6	6
1000 2000.....	0	12	6..	0	15	0	0
2000 3000.....	0	15	0..	1	5	0	0
3000 and upwards	1	5	0..	1	10	0	0

Inland bill, though not made payable to the bearer, or to order, if the same shall be delivered to the payee, or some person on his or her behalf, the same duty as on an inland bill of exchange for the like sum payable to bearer or order.

Inland bill, for the payment of any sum of money, weekly, monthly, or at any other stated periods, if made payable to the bearer, or to order, or if delivered to the payee, or some person on his or her behalf, where the total amount of the money thereby made payable shall be specified therein, or can be ascertained therefrom, the same duty as on a bill payable to bearer or order on demand, for a sum equal to such total amount.

And where the total amount of the money thereby made payable shall be indefinite, the same duty as on a bill on demand for the sum therein expressed only.

FOREIGN BILLS OF EXCHANGE,

DRAWN IN SETS.

For every bill of each set, not exceeding £100	£0	1	6
Exceeding £100 and not exceeding 200	0	3	0
200 — — 500	0	4	0
500 — — 1000	0	5	0
1000 — — 2000	0	7	6
2000 — — 3000	0	10	0
3000 and upwards	0	15	0

A foreign bill drawn in but payable out of Great Britain, if drawn singly, the same duty as an inland bill.

ADMISSION to act as Advocate in Ecclesiastical Courts, or High Court of Admiralty in England, or in courts of justice in Scotland, or to the degree of Barrister at Law in England (for register or entry thereof) ... £50 0 0

Admission to Act as Attorney, Solicitor, Proctor, Sworn Clerk, Side Clerk, &c. (whose employments depend upon being retained); or to act as Writer to the Signet, Solicitor, Agent, Attorney, or Procurator in the Scotch Courts 25 0 0

Admission to act as Solicitor or Agent in the Court of Session, Justiciary, or Commission of Teinds in Scotland, where the party has not served five years under regular articles or indentures of clerkship or apprenticeship, a further duty of.....			£60	0	0
Admission to act as Procurator or Solicitor in the High Court of Admiralty in Scotland, the Commissary Court at Edinburgh, or any inferior court in Scotland, not having served an apprenticeship under regular indentures as above, the further duty of.....			30	0	0
Admission as Master in Chancery, one of the Six Clerks, or one of the Cursitors of the Court of Chancery in England; or as Sworn Clerk, Side Clerk, Clerk in Court, or other Clerk or Officer employed to do certain official business, and whose employments are so far certain; when the salary, fees, and emoluments shall not amount to 50 <i>l.</i> per annum			2	0	0
From £50 to £100.....	£4	From £750 to £1000.....	£50		
100 — 200.....	6	1000 — 1500.....	75		
200 — 300.....	12	1500 — 2000.....	100		
300 — 500.....	25	2000 — 3000.....	150		
500 — 750.....	35	3000 or upwards....	200		
Admission to be a Member of the four Inns of Court in England; to be a Fellow of the College of Physicians in England or Scotland.....			25	0	0
Admission to be a Member of the Inns of Chancery....			3	0	0
Admission or Licence by the College of Physicians in England or Scotland, to exercise the faculty of physic, &c.....			15	0	0
Admission to matriculate in either of the English Universities.....			1	0	0
Admission to the degree of B.A. in the same Universities, if conferred in the ordinary course.....			3	0	0
Admission to the same degree conferred by special grace or royal mandate			5	0	0
Admission to any other degree in the same Universities, if conferred in the ordinary course.....			6	0	0
Admission to the like degree conferred by special grace, &c.....			10	0	0
Admission to the degree of M.D. in the Universities in Scotland.....			10	0	0
Admission to any corporation or company, in any city, borough, burgh, or town corporate in Great Britain, when the admission is in respect of birth, apprenticeship, or marriage			1	0	0
Admission to the same on other ground			3	0	0

Exemptions — Advocates, Attorneys, Solicitors, &c. admitted in one Court, on being admitted to another, the latter admission is free of duty; where officers are admitted annually, every admission after the first is free of duty; also craftsmen having previously entered freemen, on being admitted into corporations. But in all cases not expressly exempted, the proper duty is to be paid on every admission of the same person.

ADVERTISEMENT contained in the London Gazette, or in any other Newspaper.....	£0	3	6
Advertisement contained in or published with any periodical pamphlet whatsoever, printed and published in Great Britain, or in or with any Part or Number of any Book or Literary Work published in Parts or Numbers	0	3	6
AFFIDAVIT, not made for immediate purpose of being filed in court, on every sheet.....	0	2	6
AGREEMENT, or any minute or memorandum of an agreement, for matters of the value of 20 <i>l.</i> or upwards, which does not contain more than 1080 words.....	1	0	0
Containing more than 1080 words.....	1	15	0
And for every entire quantity of 1080 words over and above the first 1080, a further progressive duty of..	1	5	0

Where divers letters which have been written shall be offered in evidence of any agreement, it will be sufficient if any one of such letters has been stamped with the duty of 1*l.* 15*s.* whatever the number of words may be.

Exemptions.—Memorandums of heads of insurances to be made by the Royal Exchange and London Assurance Corporations—of agreement for lease or tack at rent, under 5*l.*—for the hire of any labourer, artificer, or servant—relating to sales of goods—of agreement between ship-masters or sailors for wages on coasting voyages—letters by post, containing evidence of agreement in respect to merchandize between merchants residing at the distance of 50 miles from each other.

ALMANACK or CALENDAR, or any Book or Pamphlet serving the purpose of an Almanack or Calendar, for one year only	0	1	3
For several years; for each year for which such Almanack or Calendar shall be made or intended.....	0	1	3
Perpetual	0	10	0

If any apprentice, journeyman, or servant of any printer, shall print any almanack on unstamped paper, without his knowledge, it shall be lawful for any person to seize such apprentice, journeyman, or servant, and carry him before any justice, who may commit him to the house of correction, for any time not exceeding three calendar months.

APPOINTMENT of Chaplain, which qualifies to hold two benefices	2	0	0
APPRAISEMENT of estate or effects, when the value does not exceed 50 <i>l.</i>	0	2	6
Exceeding 50 <i>l.</i> and not exceeding 100 <i>l.</i>	0	5	0
100.....200	0	10	0
200.....500	0	15	0
Above 500 <i>l.</i>	1	0	0

APPRENTICESHIP.—Indentures or other instruments relating to the services of persons learning a profession, trade, or employment, except articles to attorneys and others specially charged, when the value given or conveyed to the master does not amount to 30 <i>l.</i>	1	0	0
Amounting to £30 and not to £50.....	2	0	0
50 — — 100.....	3	0	0
100 — — 200.....	6	0	0
300 — — 400.....	20	0	0
400 — — 500.....	25	0	0

Amounting to £500 and not to £800.....	£30	0	0
800 — 800.....	40	0	0
800 — 1000.....	50	0	0
1000 or upwards.....	60	0	0

Where there shall be no such consideration as aforesaid, if the indenture shall not contain more than

1080 words..... 1 0 0

If the same contain more than that quantity..... 1 15 0

The duty on indentures for transferring apprentices by assignment or turn-over to a new master, are the same as at first, in proportion to any new consideration. If no consideration, and the indenture contains no more than 1080 words, the duty of 1*l.* is paid; if more words, 1*l.* 15*s.* If duplicates be made, the same duty is charged for each, when it does not exceed 35*s.*; if the duty exceed that, only one part is charged with the *ad valorem* duty, and the other part with 35*s.*—The Indentures of Parish and Charity Apprentices are exempt.

* ASSIGNATION or ASSIGNMENT of property, real or personal, not otherwise charged or expressly exempted 1 15 0

* AWARD in England, and Award or Decreet-Arbitral in Scotland 1 15 0

BARGAIN and SALE (or Lease) for a year, where the purchase or consideration money shall not amount to 20*l.*..... 0 10 0

Where it shall amount to £20 and not to £50..... 0 15 0

50 — 150..... 1 0 0

150 or upwards..... 1 15 0

Bargain and Sale (or Lease) for a year, upon any other occasion..... 1 15 0

* Bargain and Sale (to be enrolled) of any estate of freehold, in lands or other hereditaments, upon any other occasion than Mortgage or Sale..... 5 0 0

BILL of LADING, of or for any goods, merchandise, or effects, to be exported or carried coastwise..... 0 3 0

BOND in England, and Personal Bond in Scotland, given as security for the payment of any definite and certain sum of money, and not exceeding 50*l.*..... 1 0 0

Exceeding £50 and not exceeding £100 1 10 0

100 — — — 200 2 0 0

200 — — — 300 3 0 0

300 — — — 500 4 0 0

500 — — — 1000 5 0 0

1000 — — — 2000 6 0 0

2000 — — — 3000 7 0 0

3000 — — — 4000 8 0 0

4000 — — — 5000 9 0 0

5000 — — — 10,000 12 0 0

10,000 — — — 15,000 15 0 0

15,000 — — — 20,000 20 0 0

20,000..... 25 0 0

* Where any of the instruments marked with a * contain 2160 words or upwards, then for every entire quantity of 1080 words after the first 1080, the further progressive duty of 1*l.* 5*s.*

Bond in England, and Personal Bond in Scotland, given as a security for the re-payment of any sum of money, to be lent or paid, or which may become due upon an account current, where the total amount shall be uncertain, and without any limit £25 0 0

Where limited to a given sum, the duty is as on a bond for such limited sum.

Bond as security for the transfer or re-transfer of stock, the same duty as a bond for a sum equal in value to the stock.

Bond in England, and Personal Heritable Bond in Scotland, given as a security for the payment of any annuity, or sum of money at stated periods, for the term of life, or any other indefinite period, where the sum secured shall not amount to 10<i>l.</i> per ann.			1	0	0
Amounting to £10 and not to £50			2	0	0
50	—	100	3	0	0
100	—	200	4	0	0
200	—	300	5	0	0
300	—	400	6	0	0
400	—	500	7	0	0
500	—	750	9	0	0
750	—	1000	12	0	0
1000	—	1500	15	0	0
1500	—	2000	20	0	0
2000 or upwards			25	0	0

Bond commonly called Counter-Bond in England, and Personal Bond of Relief in Scotland..... 1 15 0

Bond in England, and Personal Bond in Scotland, for the due execution of an office, and to account for money received by virtue thereof..... 1 15 0

Bond given pursuant to the directions of any act of parliament, or by the direction of the commissioners of customs or excise..... 1 0 0

Bond entered into on obtaining a marriage licence..... 1 0 0

Bond on obtaining letters of administration in England, or a confirmation of testament in Scotland..... 1 0 0

Bond in England, and Personal Heritable Bond in Scotland, of any kind whatever, not otherwise charged or exempt..... 1 15 0

Where any Bond, together with any Schedule, Receipt, or other matter, indorsed or annexed, shall contain 2160 words or upwards, there shall be charged for every entire quantity of 1080 words contained therein over and above the first 1080 words, a further progressive duty of..... 1 5 0

Exemptions.—Bonds of Royal Exchange and London Assurance Corporations, exempted by 6 Geo. I.—Bonds exempted by the 28th of Geo. III. and other acts for the encouragement of fisheries.—Bonds exempted by the 28th and 29th of Geo. III. and other acts relative to the exportation of wool, tobacco, &c.—Bonds for carrying goods coastwise.—Bonds exempted by the acts for the encouragement of friendly societies.—Bonds for making playing cards, and selling or using stamps for newspapers.—Bonds given by collectors of Assessed Taxes; by seamen's relations; and by persons administering, when the property does not exceed 20*l.*

CERTIFICATES taken out yearly by Attorneys, Solicitors, Members of Inns of Court, Conveyancers, &c. in England; by Writers to the Signet, Procurators, &c. in Scotland; if of three years standing, and residing in London or within the limits of the Twopenny-Post, or within the city or shire of Edinburgh....			£12	0	0
If not of so long standing			6	0	0
If he shall reside elsewhere, and shall have been in possession of his office for three years.....			8	0	0
If not of so long standing			4	0	0
But no one person is obliged to take out more than one certificate, although he may act in more than one of the capacities aforesaid, or in several of the courts aforesaid.					
Certificate of Marriage, except of any common seaman, marine, or soldier.....			0	5	0
Certificate of any person having received the Holy Sacrament.....			0	5	0
Certificate of any goods, wares, or merchandise, having been duly entered inwards, which shall be entered outwards for exportation.....			0	4	0
CHARTER of resignation, or of confirmation, or novodamus, or upon apprising, or upon a decret or adjudication of sale of any lands, or other heritable subjects in Scotland, holden of any subject superior			0	9	0
If the same shall contain 2160 words, then for every 1080 after the first 1080.....			6	9	0
CHARTER-PARTY , or any agreement or contract for the charter of any ship or vessel, or any memorandum, letter, or other writing, relating to the freight, &c.			1	15	0
If the same, together with any thing indorsed thereon or annexed thereto, shall contain 2160 words, for every 1080 after the first 1080 words.....			1	5	0
CLERKSHIP .—Indentures for serving as a Clerk, in order to be admitted Attorney in the Courts of Westminster; in order to be sworn Clerk, &c. in the office of Six Clerks, or in the office of Pleas, or Remembrancer in the Court of Exchequer; or in order to admission as Proctor of the Admiralty..			120	0	0
For the same mode to admission as above into the Welsh Courts, those of the Counties Palatine of Lancaster, Chester, or Durham, or other courts of record; or in order to admission as Writer of the Signet, or Solicitor in any court in Scotland.....			60	0	0
For the same, in order to admission as Procurator in the Scotch Courts of Admiralty, or Commissary Court of Edinburgh.....			30	0	0
For duplicates of indentures in the above cases.....			1	15	0
COLLATION , by any Archbishop or Bishop to any ecclesiastical benefice of the yearly value of ten pounds or upwards in the king's books.....			20	0	0

Collation, by any Archbishop, or Bishop, to any other ecclesiastical benefice, dignity, or promotion whatsoever, in England	£10	0	0
Collation, Institution, or Admission to any ecclesiastical benefice in Scotland.....	2	0	0
COMMISSION to any officer in the army, or in the corps of Royal Marines.....	1	10	0
Commission to any officer in the navy.....	0	5	0
Commission or Deputation, by the commissioners of excise	1	0	0
Commission, appointing Receiver-General of the Land and other Taxes, for any county or district in Great Britain.....	25	0	0
Commission appointing Manager or Director of Lotteries	20	0	0
COMPOSITION DEED, between Debtors and Creditors.	1	15	0
Where the same shall contain 2160 words or upwards, for every 1080 words after the first 1080..	1	5	0
CONVEYANCE upon the sale of lands, tenements, rents, annuities, or other property—where the purchase or consideration money therein or thereupon expressed shall not amount to 20 <i>l</i>	0	10	0
£20 and not to £50 ...	£1	0	
50 — 150 ...	1	10	
150 — 300 ...	2	0	
300 — 500 ...	3	0	
500 — 750 ...	6	0	
750 — 1000 ...	9	0	
1000 — 2000 ...	12	0	
2000 — 3000 ...	25	0	
3000 — 4000 ...	35	0	
4000 — 5000 ...	45	0	
5000 — 6000 ...	55	0	
6000 — 7000 ...	65	0	
7000 — 8000 ...	75	0	
£8000 & not £9000..	£85	0	
9000 — 10,000..	95	0	
10,000 — 12,000..	110	0	
12,000 — 15,000..	130	0	
15,000 — 20,000..	170	0	
20,000 — 30,000..	240	0	
30,000 — 40,000..	350	0	
40,000 — 50,000..	450	0	
50,000 — 60,000..	550	0	
60,000 — 80,000..	650	0	
80,000 — 100,000..	800	0	
100,000 or upwards ..	1000	0	

And where any freehold lands or hereditaments in England shall be conveyed by a Deed of Feoffment, with or without any Letter of Attorney to deliver or receive Seisin, or by a Deed of Bargain and Sale enrolled; such Deed of Feoffment or Bargain and Sale, unless accompanied with a Lease or Release, shall be charged with a further duty as follows:—

If the consideration money shall be under 20 <i>l</i>	0	10	0
Amounting to £20 and not to £50,.....	0	15	0
50 — 150.....	1	0	0
150 or upwards.....	1	15	0

But if there shall be both a Feoffment and a Bargain and Sale enrolled, then the said further duty shall not attach on either.

Where the principal deed with schedule or indorsements contains 2160 words or upwards, for every 1080 words after the first, a further progressive duty of 1 0 0

Conveyance of any kind, not otherwise charged.....	£1	15	0
When the same exceeds 2160 words, then for every 1080 words after the first 1080	1	5	0
Copy of any deed, attested to be a true copy, for the purpose of being given in evidence, <i>the same duty as for the original.</i>			
Where such copy is made for the security or use of any person not having immediate interest under the deed	0	1	0
For every 720 words after the first 720.....	0	1	0
Copy or Extract of any memorial, or of the register of any memorial.....	0	5	0
And for every piece of vellum, parchment, or paper, upon which any such copy or extract shall be written, after the first, a duty of.....	0	5	0
Copy or Extract of any deed, not falling under the description of law proceedings, taken from the rolls or records of any of the courts at Westminster...	0	2	0
And for every piece of vellum, parchment, or paper, upon which any such copy or extract shall be written, after the first, a further progressive duty of	0	2	0
Copy, attested or authenticated, or made for the purpose of being given in evidence as a true copy of any original will, testament, or codicil, or of any letter of administration, &c. or any part thereof..	0	1	0
And for every 720 words after the first 720.....	0	1	0
Office Copy or Extract of any will or codicil deposited in any ecclesiastical court in England.....	0	1	0
And for every 90 words after the first 90.....	0	1	0
COPYHOLDS.—Surrenders, Admittances, or Licences to demise, made or granted out of Court, or Memorandums thereof respectively; and Copy of Court-Roll of any Surrender, Admittances, or Licence to demise, made in Court, where the clear yearly value exceeds 20s.	1	0	0
Where it does not exceed 20s.	0	5	0
When those instruments, or copies thereof, contain 2160 words or upwards, then for every 1080 words after the first 1080.....	1	0	0
Copy of Court-Roll, of the several surrenders, admittances, and other acts in Court, for perfecting a common recovery, if the value of the estate exceeds 20s. for five times	1	0	0
When it does not exceed 20s. for five times.....	0	5	0
Voluntary Grant by Lord or Steward of the Manor, or memorandum thereof, value of estate above 20s. twice	1	0	0
When the value is not above 20s. twice.....	0	5	0
The above instrument or copy, when containing 2160 or more words, pays for every 1080 words after the first 1080.....	1	0	0

DEBENTURE or Certificate, entitled to Drawback of Customs or Excise Duties, or any bounty not exceeding 100 <i>l</i>			£0	5	0
From £100 to £200.....			0	10	0
200 — 500			1	0	0
Exceeding 500			2	0	0
Debentures on the exportation of linen or sail-cloth are exempt.					
DECLARATION of any use or trust, not being a deed or will			1	15	0
Where the same, with any schedule or other matter, contains 2160 words or upwards, for every 1080 words after the first 1080.....			1	5	0
DEED of any kind whatever, not otherwise charged nor exempted			1	15	0
Where the same, together with any schedule or other matter, contains 2160 words or upwards, for every 1080 words after the first 1080			1	5	0
DEPUTATION or Appointment of a Game-Keeper			1	15	0
EXCHANGE .—Any Deed or Instrument of Exchange, when no sum, or a sum under 300 <i>l</i> . is paid for equality of exchange			1	15	0
When 300 <i>l</i> . or upwards shall be paid, or agreed to be paid, the same <i>ad valorem</i> duty as for a conveyance on a sale of lands for a sum equal to the sum so paid or agreed to be paid.					
If 2160 or more words, for every 1080 after the first 1080, if the deed be liable in the first instance to a duty of 1 <i>l</i> . 15 <i>s</i>			1	5	0
If liable to a higher duty in the first instance.....			1	0	0
And any duplicate of any such deed shall be charged with the same duty; and if the exchange shall be effected by separate conveyances by distinct deeds, each deed shall be charged with the same duty.					
And in case there shall be more than one deed for completing the title, the principal deed only shall be charged under this head of exchange; and any subordinate or collateral deed shall be charged with the duty to which it may be liable under any other description.					
EXEMPLIFICATION , or CONSTAT , under the Great Seal, of any letter patent or grant, for every skin, sheet, or piece of vellum, parchment, or paper.....			5	0	0
FACULTY , from the Archbishop of Canterbury, or the Master of the Faculties for time being, &c. not otherwise charged			30	0	0
Lease or Tack of any lands, hereditaments, or heritable subjects, at a yearly rent, without any sum of money by way of fine, premium, or grassum, paid for the same, where the yearly rent shall not amount to £20			1	0	0
Amounting to £20 and not to 100.....			1	10	0
100	—	200	2	0	0
200	—	400	3	0	0
400	—	600	4	0	0
600	—	800	5	0	0
800	—	1000	6	0	0
1000.or. upwards.....			10	0	0

Lease, or Tack, of any kind not otherwise charged ...	£1	15	0
And for the duplicate of any Lease or Tack, charged with a duty of 1 <i>l</i> . the like duty of.....	1	0	0
Duplicate of any other Lease or Tack	1	10	0
Where Duplicate contains 2160 words or more, for every 1080 words after the first 1080, the further progressive duty of	1	0	0

LEGACIES, the Successions to personal or moveable estates upon intestacy:—

1. *Where the testator, or intestate, died before or upon the 5th of April, 1805, and where payment shall be made on or after the 31st of August, 1815;*

Every legacy of 20*l*. or upwards, of every clear residue devolving to two or more persons, where such residue or share amounts to 20*l*. and upwards, (after deducting debts, funeral expences, legacies, and other charges first payable thereout)—

For the benefit of a brother or sister, or any descendant of a brother or sister of the deceased, a per centum duty of..... 2 10 0

For the benefit of a brother or sister of the father or mother of the deceased, or any of their descendants, a per centum duty of..... 4 0 0

For the benefit of a brother or sister of a grandfather or grandmother, or any of their descendants, a per centum duty of..... 5 0 0

For the benefit of any person in any other degree of collateral consanguinity, or any stranger in blood of the deceased, a per centum duty of..... 8 0 0

2. *Where the testator, or intestate, shall have died after the 5th day of April, 1805, and where payment shall be made after the 31st day of August, 1815;*

Every legacy, residue, or share of residue, as in the preceding section, of 20*l*. or upwards, which shall be given—

For the benefit of a child of the deceased, or any descendant of a child of the deceased, or to or for the benefit of a father or mother, or any lineal ancestor of the deceased, a per centum duty of 1 0 0

For the benefit of a brother or sister of the deceased, or any descendant of a brother or sister of the deceased, a per centum duty of..... 3 0 0

For the benefit of a brother or sister of the father or mother of the deceased, or any descendant of a brother or sister of the father or mother of the deceased, a per centum duty of..... 5 0 0

For the benefit of a brother or sister of a grandfather or grandmother of the deceased, or any descendant of a brother or sister of the grandfather or grandmother of the deceased, a per centum duty of.... 6 0 0

For the benefit of any person in any other degree of collateral consanguinity to the deceased than is above described, or any stranger in blood to the deceased, a per centum duty of£10 0 0

All gifts of annuities, or by way of annuity, or of any other partial benefit or interest, out of any such estate or effects as aforesaid, shall be deemed legacies within the intent and meaning of this schedule.

Exemptions.—On legacies, &c. for the benefit of the husband or wife of the deceased, or any of the Royal Family; also, all legacies exempted from the duty, by acts relating to corporate bodies.

LETTERS OF ADMINISTRATION to be granted in England; **CONFIRMATION** of any **TESTAMENT** dative, to be expedited in any Commissary Court in Scotland, where the deceased shall have died intestate before or upon the 10th day of October, 1808, and subsequent to the 10th day of October, 1804; or **INVENTORY** to be exhibited and recorded in any Commissary Court in Scotland, of the estate and effects of any person deceased, who shall have died intestate after the 10th day of October, 1808; where the estate and effects, exclusive of what the deceased shall have been possessed or entitled to as a trustee, and not beneficially, shall be above the value of 20*l.* and under the value of 50*l.* 0 10 0

£50	£100....	£1 0	£35,000	£40,000	£785 0
100	200....	3 0	40,000	45,000	900 0
200	300....	8 0	45,000	50,000	1,010 0
300	450....	11 0	50,000	60,000	1,125 0
450	600....	15 0	60,000	70,000	1,350 0
600	800....	22 0	70,000	80,000	1,575 0
800	1,000....	30 0	80,000	90,000	1,800 0
1,000	1,500....	45 0	90,000	100,000	2,025 0
1,500	2,000....	60 0	100,000	120,000	2,250 0
2,000	3,000....	75 0	120,000	140,000	2,700 0
3,000	4,000....	90 0	140,000	160,000	3,150 0
4,000	5,000....	100 0	160,000	180,000	3,600 0
5,000	6,000....	150 0	180,000	200,000	4,050 0
6,000	7,000....	180 0	200,000	250,000	4,500 0
7,000	8,000....	210 0	250,000	300,000	5,625 0
8,000	9,000....	240 0	300,000	350,000	6,750 0
9,000	10,000....	270 0	350,000	400,000	7,875 0
10,000	12,000....	300 0	400,000	500,000	9,000 0
12,000	14,000....	330 0	500,000	600,000	11,250 0
14,000	16,000....	375 0	600,000	700,000	13,500 0
16,000	18,000....	420 0	700,000	800,000	15,750 0
18,000	20,000....	465 0	800,000	900,000	18,000 0
20,000	25,000....	525 0	900,000	1,000,000	20,250 0
25,000	30,000....	600 0	1,000,000 and upwards		22,500 0
30,000	35,000....	675 0			

Exemptions.—Letters of Administration, Confirmation of any Testament dative, and Inventory of the effects of any common seaman, marine, or soldier, who shall die in the service of his Majesty.

141

LETTER or Power of Attorney, for receiving prize money.	£0	1	0
and for receiving wages ..	1	0	0
Letter of Attorney for the sale, transfer, or receipt of dividends of the funds	1	0	0
Letter or Power of Attorney of any other kind, or commission or faculty in the nature thereof.....	1	10	0
Where the same contains 2160 words or more, for every 1080 words after the first 1080	1	0	0
Letter of Licence from creditors to a debtor.....	1	15	0
When containing 2160 words or more, for every 1080 words after the first.....	1	5	0
Letters of Marque and Reprisal.....	5	0	0
LICENCES.—Appraiser, yearly.....	0	10	0
Banker, or other person re-issuing notes payable to the bearer on demand, yearly	30	0	0
Notary Public, in England,	30	0	0
, in Scotland.....	20	0	0
Pawnbrokers, in London and Westminster, or within Twopenny Post limits, yearly	15	0	0
In any other place, yearly.....	7	0	0
Physic, to exercise the faculty of	15	0	0
Stage-Coach Proprietors.—Licence to be taken out yearly by the person or persons who shall keep any coach or other carriage with two or more wheels, to be employed as a stage-coach or carriage for conveying passengers for hire to or to and from any place or places in Great Britain; for each such or other carriage.....	0	10	0
Licence for Marriage, in England, special	5	0	0
If not special.....	0	10	0
Licence to be granted by any archbishop, bishop, vicar-general, or other competent authority in England, for the non-residence of any clergyman upon his living, pursuant to the 43 Geo. III.	1	0	0
Licence of any kind, not otherwise charged in the schedule, which shall pass the seal of any archbishop, bishop, chancellor, or any other ordinary of any ecclesiastical court in England, or which shall be granted by any presbytery or other ecclesiastical power in Scotland	2	0	0
MEMORIAL, to be registered pursuant to any act of parliament made or to be made for the public registering of Deeds and Conveyances, in England	0	10	0
And for every piece of vellum, parchment, or paper, upon which any such memorial shall be written, after the first, a further duty of	0	10	0
Memorial, to be registered or enrolled pursuant to act of parliament, of any deed or instrument, deeds or instruments, whereby any annuity shall be granted or secured in England	1	0	0

T

And for every piece of vellum, parchment, or paper, upon which any such memorial shall be written, after the first, a further duty of £1 0 0

MORTGAGE made as a security for the payment of any definite and certain sum of money advanced, or lent at the time, or previously due and owing, or forborne to be paid, being payable, not exceeding 50l. 1 0 0

Exceeding £50 and not exceeding £100. 1 10 0

100	—	—	200	.....	2 0 0
200	—	—	300	.....	3 0 0
300	—	—	500	.....	4 0 0
500	—	—	1000	.....	5 0 0
1000	—	—	2000	.....	6 0 0
2000	—	—	3000	.....	7 0 0
3000	—	—	4000	.....	8 0 0
4000	—	—	5000	.....	9 0 0
5000	—	—	10,000	.....	12 0 0
10,000	—	—	15,000	.....	15 0 0
15,000	—	—	20,000	.....	20 0 0
20,000	—	—		.....	25 0 0

If the total amount of the money secured, or to be ultimately recoverable, shall be uncertain and without any limit 25 0 0

NOMINATION by his Majesty, or by any other patron, to a perpetual curacy in England 1 10 0

NOTARIAL ACT, any whatsoever, not otherwise charged in the schedule. 0 5 0

And for every sheet or piece of paper, parchment, or vellum, upon which the same shall be written, after the first, a further progressive duty of 0 5 0

PAMPHLETS, or Books or Papers commonly so called, printed and published in Great Britain, containing one whole sheet, and not exceeding eight sheets in octavo or any lesser page, or not exceeding twelve sheets in quarto, or twenty sheets in folio; for every sheet of any kind of paper contained in one copy thereof. 0 3 0

And all Parts or Numbers of any Book or Literary Work published in Parts or Numbers, exceeding one whole sheet, but not exceeding eight sheets in octavo or any lesser page, or not exceeding twelve sheets in quarto, or twenty sheets in folio, shall be deemed Pamphlets.

Exemptions.—Acts of Parliament, Proclamations, Orders of Council, Forms of Prayer and Thanksgiving, and Acts of State, ordered to be printed by his Majesty; Printed Votes, or other matters, by order of either House of Parliament; Books commonly used in the Schools of Great Britain; Books containing only matters of Devotion or Piety; Papers containing a single Advertisement printed and dispersed separately; Daily Accounts or Bills of Goods imported and exported, and the Weekly Bill of Mortality, provided such Bills or Accounts do not contain any other matter than what hath been usually comprised therein.

PASSPORTS. 0 5 0

PLATE of GOLD, made or wrought, with the exception of Gold Watch-Cases, and marked, &c. in Great Britain, for every ounce 0 17 0

PLATE of SILVER, made or wrought and marked in Great Britain, for every ounce £0 1 6

Exemptions.—All Watch-Cases, Chains, Necklace-Beads, Locketts, Philligree-work, Shirt-Buckles, or Broaches, stamped Medals, and Spouts to China, Stone, or Earthenware Tea-pots, of silver, of any weight whatsoever, and a variety of small articles for the table.

POLICY of Assurance or Insurance, or other instrument, made upon any life or lives, or event or contingency depending upon life or lives, where the sum insured shall not amount to 500*l*. 1 0 0
Amounting to £500 and not £1000 2 0 0
 1000 — 3000 3 0 0
 3000 — 5000 4 0 0
 5000 and upwards 5 0 0

Policy upon any building, goods, wares, merchandize, or other property, from loss or damage by fire only 0 1 0
And for and in respect of every sum of 100*l*. and so in proportion for any greater or less sum, which shall be insured in or by any such policy or instrument from loss or damage by fire only, after the 28th day of September, 1815, a duty at the rate of three shillings per annum, conformably to the regulations and provisions of the said act of the 22d year of his Majesty's reign, relating to the duty thereby imposed on such assurances. 0 3 0

Policy whereby any insurance shall be made, pursuant to the act of the 50th year of his Majesty's reign, c. 35. by any person or persons not being licensed pursuant to the said act of the 22d year of his Majesty's reign, of or upon any buildings, goods, wares, merchandize, or other property, situated and being in any of the islands, settlements, or territories, belonging to or under the dominion of his Majesty, his heirs or successors, in the West Indies, or elsewhere beyond the seas, from loss or damage by fire, for any time not exceeding twelve calendar months 0 2 6

And also the further duty following: viz.
If the whole sum insured shall not exceed 100*l*. 0 5 0
And if the whole sum insured shall exceed 100*l*. then for every 100*l*. and also for every fractional part of 100*l*. whereof the same shall consist 0 5 0

Policy upon any ship or vessel, or upon any goods, merchandize, or other property, on board of any ship, or vessel, &c. for or upon any voyage from any port or place in the United Kingdom of Great Britain and Ireland, or in the Islands of Guernsey, Jersey, Alderney, or Sark, or the Isle of Man, to any other port or place in the said kingdom or islands, or Isle of Man:—

Where the premium or consideration shall not exceed the rate of twenty shillings per centum on the sum insured; if the whole sum insured shall not exceed 100 <i>l</i>	£0	1	3
And if the whole sum insured shall exceed 100 <i>l</i> . then for every 100 <i>l</i> . and also for any fractional part of 100 <i>l</i> . whereof the same shall consist	0	1	3
And where the premium or consideration for such insurance, actually and <i>bond fide</i> paid, given, or contracted for, shall exceed the rate of twenty shillings per centum on the sum insured, if the whole sum shall not exceed 100 <i>l</i>	0	2	6
And if the whole sum insured shall exceed 100 <i>l</i> . then for every 100 <i>l</i> . and also for any fractional part of 100 <i>l</i> . whereof the same shall consist	0	2	6

But if the separate interests of two or more distinct persons shall be insured by one policy or instrument, then the said duty of 1*s*. 3*d*. or 2*s*. 6*d*. as the case may require, shall be charged thereon, in respect of each and every fractional part of 100*l*. as well as in respect of every full sum of 100*l*. which shall be thereby insured upon any separate and distinct interest.

Policy upon any ship or vessel, goods, merchandize, or other property on board of any ship or vessel, or upon any other voyage than before specified, or for any certain term or period of time, not exceeding twelve calendar months; where the premium or consideration for insurance, actually and <i>bond fide</i> paid or contracted for, shall not exceed the rate of twenty shillings per centum on the sum insured; if the whole sum shall not exceed 100 <i>l</i>	0	2	6
And if the whole sum shall exceed 100 <i>l</i> . then for every 100 <i>l</i> . and also for every fractional part of 100 <i>l</i> . whereof the same shall consist	0	2	6
And where the premium or consideration for such insurance, actually and <i>bond fide</i> , paid, given, or contracted for, shall exceed the rate of twenty shillings per centum on the sum insured, if the whole sum insured shall not exceed 100 <i>l</i>	0	5	0
And if the whole sum insured shall exceed 100 <i>l</i> . then for every 100 <i>l</i> . and also for any fractional part of 100 <i>l</i> . whereof the same shall consist	0	5	0

But if the separate interests of two or more distinct persons shall be insured by one policy or instrument, then the said duty of 2*s*. 6*d*. or 5*s*. as the case may require, shall be charged thereon, in respect of each and every fractional part of 100*l*. as well as in respect of every full sum of 100*l*. which shall be thereby insured upon any separate and distinct interest.

Policy of a Mutual Insurance, whereby divers persons shall insure, or agree to insure one another, without any premium or pecuniary consideration, upon any voyage from any port or place in the United Kingdom of Great Britain and Ireland, or in the Islands of Guernsey, Jersey, Alderney, or Sark, or the Isle of Man, to any other place in the said kingdom or

islands, or Isle of Man; for every sum of 100 <i>l.</i> and also for each and every fractional part of 100 <i>l.</i> thereby insured by any person or person.....	£0	2	6
Policy upon any other voyage whatsoever, or for any period of time not exceeding twelve calendar months, for every sum of 100 <i>l.</i> and also for each and every fractional part of 100 <i>l.</i> thereby insured to any person or persons	0	5	0
Policy whereby any other lawful insurance whatsoever, not hereinbefore charged, shall be made against loss or damage of any kind—where the premium or consideration paid, or contracted for, shall not exceed the rate of 20 <i>s.</i> per centum on the sum insured—if the whole sum insured shall not exceed 100 <i>l.</i>	0	2	6
And if the whole sum insured shall exceed 100 <i>l.</i> then for every 100 <i>l.</i> and also for any fractional part of 100 <i>l.</i> whereof the same shall consist.....	0	2	6
And where the premium or consideration for such insurance, paid or contracted for, shall exceed the rate of 20 <i>s.</i> per cent.; and where the insurance shall be made for any other than a pecuniary consideration, if the whole sum insured shall not exceed 100 <i>l.</i>	0	5	0
And if the whole sum insured shall exceed 100 <i>l.</i> then for every 100 <i>l.</i> and also for any fractional part of 100 <i>l.</i> whereof the same shall consist.....	0	5	0

But if the separate interests of two or more distinct persons shall be insured by one policy or instrument, then the said duty of 2*s.* 6*d.* or 5*s.* as the case may require, shall be charged thereon, in respect of each and every fractional part of 100*l.* as well as in respect of every full sum of 100*l.* which shall be thereby insured upon any separate interest.

PRESENTATION by his majesty, or any other patron, to any ecclesiastical benefice, dignity, or promotion, in England, of the yearly value of 10 <i>l.</i> or upwards in the king's books	20	0	0
To any other ecclesiastical benefice.....	10	0	0
PROBATE of a Will to be granted in England; CONFIRMATION of any Testament to be expedied in Scotland, where the deceased shall have died before or upon the 10th of October, 1808, and subsequent to the 10th October, 1804; or INVENTORY to be exhibited and recorded in any Commissary Court in Scotland, of the estate and effects of any person deceased after the 10th of October, 1808, and who has left any testamentary disposition; where the estate and effects for which such probate, confirmation, or eik, shall be granted or expedied, or whereof such inventory shall be exhibited and recorded, exclusive of what the deceased shall have been possessed of or entitled to as a trustee, and not beneficially, shall be above the value of 20 <i>l.</i> and under the value of 100 <i>l.</i>	0	10	0

£100	£200..	£2	0	£35,000	40,000..	£525	0
200	300...	5	0	40,000	45,000..	600	0
300	450...	8	0	45,000	50,000..	675	0
450	600...	11	0	50,000	60,000..	750	0
600	800...	15	0	60,000	70,000..	900	0
800	1,000...	22	0	70,000	80,000..	1,050	0
1,000	1,500...	30	0	80,000	90,000..	1,200	0
1,500	2,000...	40	0	90,000	100,000..	1,350	0
2,000	3,000...	50	0	100,000	120,000..	1,500	0
3,000	4,000...	60	0	120,000	140,000..	1,800	0
4,000	5,000...	80	0	140,000	160,000..	2,100	0
5,000	6,000...	100	0	160,000	180,000..	2,400	0
6,000	7,000...	120	0	180,000	200,000..	2,700	0
7,000	8,000...	140	0	200,000	250,000..	3,000	0
8,000	9,000...	160	0	250,000	300,000..	3,750	0
9,000	10,000...	180	0	300,000	350,000..	4,500	0
10,000	12,000...	200	0	350,000	400,000..	5,250	0
12,000	14,000...	220	0	400,000	500,000..	6,000	0
14,000	16,000...	250	0	500,000	600,000..	7,500	0
16,000	18,000...	280	0	600,000	700,000..	9,000	0
18,000	20,000...	310	0	700,000	800,000..	10,500	0
20,000	25,000...	350	0	800,000	900,000..	12,000	0
25,000	30,000...	400	0	900,000	1,000,000..	13,500	0
30,000	35,000...	450	0	1,000,000 and upwards..		15,000	0

Exemptions.—Letters of Administration, Confirmation of any Testament devise, and Inventory of the effects of any common seaman, marine, or soldier, who shall die in the service of his Majesty.

PROCLAMATION, deed, or instrument of.....£1 10 0

And where the same shall contain 2160 words or upwards, for every 1080 words after the first 1080.. 1 0 0

PROMISSORY NOTES—see page 129.

PROTEST of any Bill of Exchange or Promissory Note of any sum of money not amounting to 20l..... 0 2 0

Amounting to 20l. and not 100l. 0 3 0

Amounting to 100l. and not 500l. 0 5 0

Amounting to 500l. or upwards 0 10 0

Protest of any kind 0 5 0

And for every sheet or piece of paper, parchment, or vellum, upon which the same shall be written after the first, a further progressive duty of 0 5 0

RECEIPTS—see page 129.

RECOGNIZANCE, Statute Merchant, and Statute Staple, entered into as a security for the performance of any covenant, contract, or agreement; or for the due execution of any office of trust; or for rendering a due account of money received or to be received; or for indemnifying any person or persons against any matter or thing..... 1 15 0

Where any such recognizance shall contain 2160 words or upwards, for every 1080 words after the first 1080 1 5 0

RELEASE and Renunciation of lands or other property, real or personal, hereditible or moveable, or of any right or interest therein; any deed or instrument of, not otherwise charged in the schedule, nor expressly exempted from all stamp duty.....			£1	15	0
Where the same contains 2160 words or upwards, for every 1080 words after the first 1080.....			1	5	0
REVOCATION of any use or trust, uses or trusts, of or concerning any estate or property, real or personal, where made by any writing not being a deed or will			1	15	0
Where the same contains 2160 words or upwards, for every 1080 words after the first 1080.....			1	5	0
SCHEDULE, Inventory, or Catalogue of any lands, hereditaments, or heritable subjects, or of any furniture, fixtures, or other goods or effects; or containing the terms and conditions of any proposed sale, &c. and regulations for the cultivation or management of any farm, lands, or other property, which shall be referred to in or by, or be intended to be used in evidence as part of, or as material to any agreement, lease, bond, deed, &c. yet separate and distinct therefrom.....			1	5	0
Where the same contains 2160 words or upwards, for every 1080 words after the first 1080.....			1	5	0
SETTLEMENT.—Any deed or instrument, whereby any definite and certain principal sum or sums of money, or any definite and certain share or shares in the public stocks or funds shall be settled upon any person or persons, either in possession or reversion, absolutely or conditionally, or in any other manner whatsoever;—if such sum or sums of money, or the value of such share or shares in all or any of the said stocks or funds, or both, shall not amount to 1000l.			1	15	0
Amounting to £1000 and not £2000.....			2	0	0
2000	—	3000	3	0	0
3000	—	4000	4	0	0
4000	—	5000	6	0	0
5000	—	7000	7	0	0
7000	—	9000	9	0	0
9000	—	12,000	12	0	0
12,000	—	15,000	15	0	0
15,000	—	20,000	20	0	0
20,000 or upwards.....			25	0	0
And where any such deed shall contain 2160 words or upwards for every 1080 words after the first 1080..			1	5	0
And for any duplicate of any such instrument as last mentioned, the same duty or duties.					
SPECIFICATION, to be enrolled or recorded, of any discovery or invention, for which a patent shall be obtained			5	0	0
Where the same shall contain 2160 words or upwards for every 1080 words after the first 1080.....			1	0	0

STAGE COACHES ,—Any carriages with two or more wheels employed as a public stage-coach or carriage, licensed for carrying not more than four inside passengers (children in lap excepted), for every mile any such coach shall travel			£0	0	2½
Licensed for carrying not more than six inside.....			0	0	3
not more than eight ditto			0	0	4
not more than ten ditto.....			0	0	4½
more than ten ditto.....			0	0	5½
SURRENDER (Lands otherwise charged in this schedule, nor expressly exempted from all stamp duty) of any term or terms of years, or of any freehold or uncertain interest, in any lands, hereditaments, or heritable subjects, not being of copyhold or customary tenure			1	15	0
Where the same contains 2160 words or upwards, for every 1080 words after the first 1080			1	5	0
TESTIMONIAL or Certificate of the admission of any person to the degree of a Bachelor of Arts, in either of the Universities in England.....			3	0	0
Testimonial or Certificate of the admission of any person to any other degree in either of the said Universities			10	0	0
TRANSFER of any share in the stock and funds of the Governor and Company of the Bank of England, or of the South Sea Company, whether upon a sale or otherwise			0	7	0
Transfer of any share in the stock and funds of the East India Company, whether upon a sale or otherwise			1	10	0
Transfer of any share or shares in the stock and funds of any other corporation, company, or society whatever, not otherwise charged under the head of mortgage, or of conveyance upon the sale of property.			1	10	0
WARRANT OF ATTORNEY (with or without a release of errors), to enter up a judgment for the payment of money or transfer of stock; where such payment or transfer shall not be already secured by a bond, mortgage, or other instrument, charged with the <i>ad valorem</i> duty—the same duty as on a bond for the like purpose.					
And where such payment or transfer shall be already secured by a bond, mortgage, or other security, which shall have paid the <i>ad valorem</i> duty as above-mentioned, and also except where the same shall be given for securing any sum for which the person shall be in custody under an arrest, in those cases a duty of			1	0	0

THE END.



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